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No. _____

In the Supreme Court of the United States

D. SCOTT FORRESTER, Conservator of the Estate of Jerry Bass,
Petitioner,

v.

KIMBERLY ROSA; MELISSA JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a statute that contains explicitly mandatory language which mandates the action officials are to take when a given set of criteria are met create a property interest that invokes the procedural due process protections of the 14th Amendment?

2. In reviewing a district court's denial of a motion for summary judgment based on qualified immunity, can the Court of Appeals consider and decide the issue of causation?

3. Are officials who are not acting within the scope of their discretionary authority entitled to qualified immunity?

4. Is it conscience shocking behavior for social workers who are charged with the protection of abused children to file a report that fraudulently misrepresented that children who were the subject of a child abuse hotline call were safe?

PARTIES TO THE PROCEEDING

Petitioner

D. Scott Forrester, Conservator of the Estate of Jerry Bass

Respondents

Kimberly Rosa and Melissa Johnson

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PETITION FOR WRIT OF CERTORARI

Petitioner D. Scott Forrester respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion for the United States Court of Appeals for the Eighth Circuit is reported at 397 F.3d 1047 (8th Cir. 2005). Petition for Rehearing was denied without opinion. Unpublished Order denying Petition for Rehearing was issued March 10, 2005.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on February 7, 2005 (App. B), and its Order denying rehearing was entered on March 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved provisions of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law...

U.S. Const. Amend. XIV, § 1.

> This case also involves 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws...

Finally, this case involves Missouri state statute §210.145 RSMo. That statute provides in part:

> 6. The local office of the division shall cause a thorough investigation to be initiated immediately or no later than within twenty-four hours of receipt of the report from the division, except in cases where the sole basis for the report is educational neglect... If the report indicates the child is in danger of serious physical harm or threat to life, an investigation shall include direct observation of the subject child within twenty-four hours of the receipt of the report.
>
> 7. The investigation shall include, but not be limited to the nature, extent and cause of the abuse or neglect; the identity and age of the person responsible therefore; the names and conditions of the other children in the home, if any; the home environment and the relationship of the subject child to the parents or other persons responsible for the child's care; any indication of incidents of physical violence against any other household or family member; and other pertinent data....
>
> 10. Protective or preventive social services shall be provided by the division to the family and subject child and to others in the home to prevent abuse or

neglect, to safeguard their health and welfare, and to help preserve and stabilize the family whenever possible. The juvenile court shall cooperate with the division in providing such services.

STATEMENT OF THE CASE

Gary and Larry Bass were scalded and starved to death in October of 1999. About two months before Gary and Larry died, the Division of Family Services (DFS) received a hotline call alleging that the boys' mother was not feeding her children and that her children looked like they were starving.

DFS case worker, Respondent Johnson, was assigned to handle the case. The report she received indicated that the matter was an emergency and that this was the sixth time that Gary and Larry Bass were the subject of a child abuse hotline call. When Johnson went to the Bass home, Gary and Larry were bound and gagged in the basement. One end of a rope was tied around the basement door's doorknob and the other end was tied to a hook so that Gary and Larry could not escape from the basement. Jerry Bass, the boys' brother, told Johnson that the boys were in the basement but Respondent Johnson did not check the basement. Although § 210.145 of the Revised Statutes of Missouri (RSMo) required her to see the boys within twenty-four hours of the hot-line call, she never saw them.

When Johnson was at the Bass house, Defendant Mary Bass told her that she needed help with the children and explained to Johnson that she could not handle the children. Ms. Bass further informed Johnson that there were some days that she wanted to knock her kids' heads off. When Johnson downplayed the statement, Defendant Bass assured Johnson that she meant what she said.

After visiting the Bass home, Johnson filed a report indicating that Gary and Larry Bass were safe even though she had never seen them or determined their well-being. In addition, she sent Defendant Mary Bass a letter explaining that a family centered services case would not be opened because "we agreed during our discussion that your family is not in need of services." This statement was untrue; Mary Bass had specifically told Johnson that she did need help with her children.

Although she was required to fill out a safety assessment form as part of her report, Johnson failed to do so. When Johnson's supervisor, Respondent Rosa, received Johnson's report and noticed that the safety assessment form had not been completed, Rosa completed the form herself. Rosa had never seen the Bass children or their abusers. Nonetheless, she completed the safety assessment form indicating that Gary and Larry Bass were safe.

The form that Johnson left blank and Rosa filled out included seventeen (17) separate "safety factor" questions. A "yes" answer to any one of the seventeen questions indicated that the children were not safe. Respondent Rosa answered "no" to every safety factor even though she knew that the answer to the fourth factor was "yes." The fourth factor on the form states, "The child's whereabouts cannot be ascertained...." Rosa admitted that Gary and Larry Bass' whereabouts could not be ascertained; nonetheless, she answered "no" to that factor. She filed the report with the understanding that no additional services would be provided to Gary and Larry Bass. About a month after Rosa completed and filed the report, Gary and Larry were burned and starved to death.

When Respondents Rosa and Johnson made the false representation that the boys were safe, at a minimum, they did not know the truth or falsity of the representation because they had never seen the boys or determined their well-being. This conduct amounts to fraudulent misrepresentation. *See* Restatement (Second) of Torts §526 (1977). By filing the false report, Respondents interfered with and cut off the protective services Gary and Larry Bass were entitled to as subjects of a child abuse hotline call. *See* § 210.145 RSMo.

Scott Forrester, as conservator of the estate of Jerry Bass who is the surviving brother of Gary and Larry Bass, filed this action seeking damages for violation of procedural and substantive due process rights as well as for state law negligence. Respondent filed a motion for summary judgment that was granted as to the state law claim and denied as to the qualified immunity defense to federal claims. The District Court held that Gary and Larry Bass had a protected property interest in the protective and preventive services mandated by Missouri statute. The Court further found that the Bass children had a substantive due process right to bodily integrity which was infringed when Respondents interfered with the protective services that the Bass boys were entitled to. The Eighth Circuit Court of Appeals reversed.

In reversing the district Court, the Eighth Circuit overlooked this Court's prior precedent holding that qualified immunity applies only to officials performing discretionary acts. The Eighth Circuit employed a two part test which did not include an analysis of whether Respondents Rosa and Johnson's conduct was discretionary. Furthermore, in determining whether the state statute at issue created a liberty interest, the Eighth Circuit employed a test that required that the statute contain explicitly mandatory language which not only mandates a particular outcome, but also that the outcome

achieve a particular result. This test ignores the line of Supreme Court cases which have consistently held that statutes which have explicitly mandatory language requiring a particular outcome create a liberty interest.

In determining whether Respondents violated Gary and Larry Bass' substantive due process rights, the Eighth Circuit found that there was no causal link between Respondents' conduct and the deprivation of the Bass children's right to bodily integrity and life. In reaching this conclusion, the Eighth Circuit ignored this Court's and its own prior opinions which have held that while an order denying a motion for summary judgment based on qualified immunity is appealable, the Court of Appeals has no jurisdiction over questions of evidence sufficiency, including causation. Finally, the Eighth Circuit concluded that Respondents' conduct did not shock their conscience.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF THE QUALIFIED IMMUNITY DOCTRINE

This Court has stated that qualified immunity applies "only to officials performing discretionary functions." *See Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982). Thus, to determine if Respondents are entitled to qualified immunity, the Court must first determine if the function being performed by the official was discretionary. The Eighth Circuit has ignored this step in determining the applicability of qualified immunity. The Eighth Circuit has stated that there is a two-step process in determining qualified immunity: 1) whether the actions alleged violate a constitutional right and 2)

whether the right was clearly established. (App. 12a-13a). This two-step process being followed by the Eighth Circuit omits the requirement set forth in *Harlow* that the official must have been performing a discretionary function.

In *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) this Court discussed the balancing act that that the qualified immunity doctrine attempts to achieve. *Id.* at 638. This Court stated:

> When government officials abuse their offices, "actions for damages may offer the only realistic avenue for vindication of constitutional guarantees." (citation omitted). On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly intimidate officials in the discharge of their duties. Prior cases have accommodated these conflicting concerns by generally providing government officials ***performing discretionary functions*** with qualified immunity.... *Id.* (emphasis added)

Consistent with these Supreme Court decisions, the Eleventh Circuit has noted that the qualified immunity inquiry involves a three step process. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). In *Vinyard*, the Eleventh Circuit noted that in determining if qualified immunity applies, the defendant must first "prove that he was acting within the scope of his discretionary authority." *Id.*

Harlow and *Anderson* hold that qualified immunity is available only if the official is performing a discretionary function. Consistent with these case, the Eleventh Circuit has

held that a defendant asserting the qualified immunity defense must first prove that he was acting within the scope of his discretionary authority. The two-step approach employed by the Eighth Circuit to analyze the applicability of qualified immunity does not include a determination of whether the defendant was acting within the scope of his discretionary authority. Review is needed because the Eighth Circuit's opinion conflicts with this Court's prior decisions and to resolve the conflict between the Eighth and Eleventh Circuit approaches to analyzing the applicability of qualified immunity.

Petitioner recognizes that in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281 (2001) and *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), this Court addressed the issue of qualified immunity without discussing the discretionary versus non-discretionary nature of the defendant's conduct. However, petitioner does not read *Saucier* and *Hope* to mean that the requirement that the official be performing a discretionary function no longer exists. Rather, it appears that the discretionary requirement of qualified immunity was not at issue in those cases, and therefore, it did not warrant discussion by this Court. Neither *Hope* nor *Saucier* gave any indication that the Court's previous opinions in *Harlow* and *Anderson* are no longer to be followed.

To the extent the *Hope* and *Saucier* opinions' failure to mention the requirement that the official be performing a discretionary function to be entitled to qualified immunity has caused confusion, Petitioner requests this Court grant this Writ to clarify the confusion. To the extent it is clear that *Saucier* and *Hope* do not change the discretionary requirement set forth in *Harlow* and *Anderson*, then Petitioner seeks

review because the Eighth Circuit opinion is in conflict with *Harlow* and *Anderson*.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHAT CHARACTERISTICS A STATUTE MUST HAVE TO CREATE A PROTECTED PROPERTY INTEREST

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 1206 (1989), this Court found, "the use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces the conclusion that the state has created a liberty interest." *Id.* at 463, 109 S.Ct. 1904.

The Eighth Circuit found that §§ 210.109 and 210.145 RSMo (the statutes) contain "'explicitly mandatory language', e.g., an investigation is required when a child abuse report, if true, would constitute a crime or attempted crime against a child; notification of law enforcement, with a request for assistance and direct observation of the child within twenty-four hours are also required under the same circumstances; and social services must be provided to the child and the family." (App. at 17a). This explicitly mandatory language establishes substantive predicates that limit discretion. In other words, if the substantive predicates are met, DFS workers are required to investigate the report, notify law enforcement, directly observe the child, and provide protective or preventive social services. Thus, the only conclusion is that the statutes create a liberty interest. *Id.*

To avoid this unavoidable conclusion, the Eighth Circuit found that to create a property interest, a statute must not only mandate an outcome to be reached upon a finding of relevant

criteria, but it must also indicate the outcome for the outcome. The Court claims that because the statutes do not mandate outcomes for the mandated investigation and social services, the statutes do not create a liberty interest. (App. at 17a-18a). This claim is not supported by fact or law.

First, the statute specifically provides that the outcome be achieved by the mandated protective or preventive social services is the prevention of abuse and the safeguarding of children. § 210.145.10 RSMo (1994). Second, and more importantly, the Eighth Circuit has ignored this Court's prior opinions which explain the elements a statute must possess to create a liberty interest. In a long line of cases, this court has found that state statutes create a liberty interest if they contain explicitly mandatory language which requires a particular outcome when certain criteria are met. *See, e.g., Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 1206 (1989) and *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). The Eighth Circuit requires the additional element that the statute must mandate the result to be achieved by the outcome mandated by the statute. Because the test created by the Court for determining whether a statute creates a liberty interest is contrary to the test set forth by this Court, Petitioners respectfully request review of this matter.

Review is additionally warranted because since this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) wherein this Court expressly declined to consider whether the relevant child protection statutes gave the plaintiff a protected property interest, there has been conflict among the lower Courts regarding this issue. *See Marisol A. v. Giuliani*, 929 F.Supp. 662, 678-679 (S.D.N.Y. 1996) and the cases cited therein.

III. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHAT ISSUES AN APPELLATE COURT CAN CONSIDER IN AN APPEAL OF AN ORDER DENYING A SUMMARY JUDGMENT MOTION BASED ON QUALIFIED IMMUNITY

In rejecting Plaintiff's substantive due process claim, the Eighth Circuit stated, "the record, however, simply does not substantiate the requisite causal connection." (App. at 21a). The issue of causation was not even before the Court. It was not raised in the motion for summary judgment nor was it raised in the briefs. What's more, the Eighth Circuit's exercise of jurisdiction over the issue of causation is contrary to this Court's opinion in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

In *Johnson*, this Court noted that the claim of qualified immunity is conceptually distinct from the merits of plaintiff's claim. *Id.* at 312, 115 S.Ct. at 2156. This Court further noted that the claim of immunity "raises a question that is significantly different from the questions underlying Plaintiff's claim on the merits, (i.e., in the absence of qualified immunity)." *Id.* at 314, 115 S.Ct. at 2157 citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, although the Court of Appeals has jurisdiction over an order denying qualified immunity, it does not have jurisdiction to decide questions of evidence sufficiency, including causation.

Review is warranted here because the Eighth Circuit's exercise of jurisdiction over the issue of causation in an appeal from a denial of a summary judgment motion based on qualified immunity is contrary to the teachings of this Court's opinions in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct.

2806, 86 L.Ed.2d 411 (1985) and *Johnson v.* Jones, 515 U.S. 304, 115 S.Ct. 2151 (1995).

Up until the decision in this case, the Eighth Circuit had followed the teachings of *Mitchell* and *Johnson*. *See Miller v. Schoenen*, 75 F.3d 1305, 1309 (8th Cir.1996) where the Court noted that, "if the issues relate to whether the actor actually committed the act...or causation, or other similar matters that the plaintiff must prove, we have no jurisdiction to review them in an interlocutory appeal of a denial of a summary judgment motion based on qualified immunity." *Id.* *See* also *Erickson v. Holloway*, 77 F.3d 1078, 1080 (8th Cir. 1996) where the Court found that "we cannot examine whether the official committed the alleged act, damages, causation, or other similar matters." *Id.* The Court offered no explanation as to why it ignored its own precedent or the teachings of this Court. Because its opinion in this case creates a conflict with its prior precedent and the teachings of this Court, Petitioner respectfully requests review of this matter.

IV. REVIEW IS WARRANTED BECAUSE OF THE IMPORTANCE OF THE ISSUES INVOLVED

The issues here involve the application of qualified immunity to two women who were entrusted with the protection of children who are the subjects of six child abuse hotline reports. Rather than provide the protective social services required by state statute, Respondents filed a report that fraudulently misrepresented that Gary and Larry Bass were safe when they were not. Respondents argued and the Court of Appeals agreed that Respondents are entitled to immunity for their conduct.

The application of immunity in any context is an important issue because, as the Missouri Supreme Court has found, "immunity fosters neglect and breeds irresponsibility...." *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599, 603 (Mo.banc 1969). The application of immunity in this context is particularly important because the neglect and irresponsibility of officials charged with the responsibility of protecting some of the most vulnerable members of our society puts children at risk of serious bodily injury and death. In addition, applying immunity here, where Respondents made fraudulent misrepresentations regarding the safety of the children, extends the application of qualified immunity beyond negligent conduct.

In *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 201, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), this Court, in ruling in favor of defendant, noted that the defendant did not do anything to render the abused child "any more vulnerable". Seizing on this language, the Seventh Circuit, in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), held that a deputy sheriff who prevented others from attempting to rescue a drowning boy could be liable under §1983, and therefore, reversed the Trial Court's summary judgment in favor of the deputy. In addressing the issue of qualified immunity, the Court found that it was sufficiently clear that a citizen in peril of his life had a Fourteenth Amendment right that prevented an officer from cutting off private avenues of life saving rescue without providing an alternative. Id. at 1432. Consequently, the Court concluded that the sheriff was not entitled to the protections of qualified immunity.

Here, Gary and Larry Bass were entitled to protective or preventive social services that would safeguard them from further abuse. *See* § 210.145.10 RSMo. Respondents interfered with Gary and Larry's right to these services by

filing a false report which indicated that Gary and Larry Bass were safe. Respondent Rosa acknowledged that by filing the report, no further action would be taken with respect to the Bass children. Pursuant to the holding in *Ross*, Respondents' are not entitled to qualified immunity for their act of cutting off the protective services that would otherwise have been available to Gary and Larry Bass.

Respondent Johnson reported that the children were safe despite being told otherwise by the abuser herself. Johnson also stated that Mary Bass agreed that no services were needed when Mary Bass actually told her that she did need help. Respondent Rosa filled out the safety assessment form as though Johnson had filled it out. Rosa knew that Gary and Larry's whereabouts could not be ascertained, but she stated on the report that their whereabouts could be ascertained. Thus, Respondents made representations that they knew were false. At a minimum, when Respondents Rosa and Johnson made the representation that the boys were safe, they did not know the truth or falsity of the representation because they had never seen the boys or determined their well-being. The representation that the boys were safe was false; they were locked in a basement without food and in the hands of a woman who had stated that she wanted to knock their heads off. The qualified immunity doctrine should not protect Respondents or any official from liability for damages resulting from their fraudulent misrepresentations. Because the Eighth Circuit has found otherwise and because of the importance of this question, Petitioner seeks review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-1923

[March 10, 2005]

D. Scott Forrester, etc., et al., Appellees,	)
v.	)
Kimberly Rosa, et al., Appellants.	)

OPINION

The petition for rehearing by the panel filed by the appellees is denied.

March 10, 2005

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-1923

[Filed, February 7, 2005]

D. Scott Forrester, Conservator of the Estate of Jerry Bass; Jerry Bass, Appellees,

v.

Mary Bass; Tony Dixon, Defendants,

Kimberly Rosa; Melissa Johnson, Appellants.

OPINION

RILEY, Circuit Judge.

Mary Bass (Bass), with her live-in partner, cruelly tortured and starved her five minor children. Two eight-year old sons, Larry and Gary, died from the abuse. D. Scott Forrester (Forrester), as personal representative of the estates

of Larry and Gary Bass and as conservator of the estate of Jerry Bass, the surviving triplet, and Jerry Bass (Jerry), individually, filed this civil rights and wrongful death action against Kimberly Rosa (Rosa) and Melissa Johnson (Johnson), two social workers employed by the Missouri Department of Social Services (MDSS) Division of Family Services (DFS). Forrester pled federal due process and state law claims, seeking damages resulting from Rosa's and Johnson's alleged violations of Missouri's child welfare statutes.

Rosa and Johnson moved for summary judgment, asserting the affirmative defenses of the public duty doctrine, official immunity, and qualified immunity. The district court determined the public duty doctrine did not apply, but granted summary judgment to Rosa and Johnson on the state law claims because Rosa and Johnson had acted in their discretionary roles and, consequently, are officially immune from suit. The district court denied Rosa and Johnson qualified immunity on the federal due process claims. Rosa and Johnson appeal the denial of qualified immunity. Concluding Forrester failed to plead viable federal due process claims, we reverse.

I. BACKGROUND

A. Factual Summary

In March 1995, DFS received the first of many hot line calls alleging Bass was battering and starving her five children, Rodney, Catina, and triplets, Larry, Gary, and Jerry. DFS investigated various abuse and neglect reports and visited the Bass home; however, DFS never deemed the hot line reports warranted local law enforcement notification or removal of the children from the home. On August 16, 1999, DFS received a hot line call in Jefferson City, Missouri. The

caller reported: (1) scratches were seen on Larry's chest; (2) Bass was starving her children as punishment; (3) Bass had locked Rodney in the basement; (4) the children were searching through trash cans for food; (5) all five children appeared dehydrated and malnourished with sunken eyes and protruding ribs; and (6) the children were so weak they could not drink from a glass without assistance. The hot line information was faxed immediately to Kansas City, Missouri, where a DFS employee screened the information according to MDSS protocol and determined a family assessment and services approach,[1] rather than an investigation,[2] was warranted.

Johnson was assigned to perform a family assessment that day on the Bass family. Johnson went to the Bass home, where she met Bass's live-in boyfriend, Tony Dixon (Dixon) at the front gate. Dixon told Johnson Bass was working and the children were not at home. Johnson told Dixon to have Bass call her. The following day Bass called Johnson at work, and Johnson returned to the Bass home to perform a family

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[1]James C. Harrison (Harrison), MDSS's Assistant Deputy Director for Child Services, testified a family assessment approach is selected for a "relatively mild or moderate case of abuse and neglect, injuries are not severe, and may be [a] first-time call[,] . . . and the report is not that serious but might have well been addressed through an assessment in which we go in and, in addition to looking at risk and safety of a child, look at the family service needs and how those service needs might be met by Division or other community agencies."

[2]Harrison testified "an investigation generally is a report that by virtue of the allegations would constitute a criminal offense if they were true. These are generally the serious reports; physical abuse and neglect, sexual abuse, generally . . . a crime against a person."

assessment. During her visit, Johnson talked to Bass, and interviewed three of the children, Ronald, Catina, and Jerry. Johnson did not see or interview Larry and Gary. Bass told Johnson that, due to their behavioral problems, Larry and Gary lived with their natural father. The children also told Johnson that Larry and Gary were living with their father. Dixon, however, told Johnson that Larry and Gary were out of town visiting their grandparents. Johnson recognized the discrepancy and recorded Dixon's seemingly contradictory statement on the family assessment form. Johnson also noted Bass "was to contact [Johnson] if Larry + Gary returned home." At no time did Johnson verify Larry's and Gary's whereabouts.

Johnson spent an hour in the Bass home. She confined her visit to the living room, which she observed to be very clean. Johnson smelled food cooking on the kitchen stove. Bass denied ever punishing her children by locking them in the basement or by withholding food from them. The children told Johnson that Bass took good care of them. The children denied Bass withheld food, locked them in the basement, or otherwise abused them. Bass attested that Johnson assured Bass she would follow-up with another visit in two weeks. The family assessment form does not indicate any intention to follow-up, nor did Johnson follow up with the family.

Following her home visit, Johnson determined no social services were needed, and she concluded the Bass children were safe, despite never seeing Larry and Gary. Johnson turned in her family assessment report without completing a mandatory safety assessment. By a form letter dated September 7, 1999, Johnson informed Bass DFS was not opening a case "because we agreed during our discussion that your family is not in need of services." Two weeks later, Johnson's supervisor, Rosa, reviewed the report and

completed the safety assessment, thereby certifying the Bass home was safe, without ever being in the Bass home or seeing the Bass children.

Two months after DFS closed the Bass file, Bass forced Larry and Gary to submerge their feet and lower legs into scalding bath water, causing severe burns. On October 20, 1999, Kansas City police, fire, and emergency medical technicians responded to a 911 call made from the Bass home. *State v. Bass*, 81 S.W.3d 595, 599 (Mo. Ct. App. 2002). Upon arrival, emergency personnel observed Bass kneeling on the living room floor near Larry, who was lifeless, emaciated, and naked except for a pair of socks. After paramedics declared Larry dead, they proceeded upstairs, where they discovered Gary, emaciated and lying on a vomit-stained mattress. En route to the emergency room, the paramedics removed Gary's socks and discovered third-degree burns on his feet and lower legs, several gangrene toes, and multiple abrasions on his back. Despite intensive medical treatment, Gary died two days later. *Id.* at 600.

To ascertain their causes of death, autopsies were performed on the boys. At death Larry measured 45 inches and weighed 31 pounds; Gary measured 47 inches and weighed 32 pounds. *Id.* The autopsies revealed the boys died from starvation and bacteria-infected thermal burns to their legs and feet. The autopsy reports classified both deaths as homicides. *Id.*

The State of Missouri indicted Bass with two counts of second-degree murder, four counts of armed criminal action, eight counts of child abuse, and two counts of first-degree endangerment. *Id.* at 601. The state also indicted Dixon, who pled guilty to child abuse and endangerment charges, and was sentenced to twenty years. A jury convicted Bass of two

counts of second-degree murder, four counts of armed criminal action, and six counts of child abuse. The trial court sentenced Bass to eight consecutive life sentences and to four additional term-of-year sentences. *Id.* The Missouri Court of Appeals affirmed Bass's convictions. *Id.* at 616.

As a result of the prosecutions, authorities learned Bass and Dixon had deceived Johnson about Larry's and Gary's whereabouts. On August 17, 1999, Larry and Gary were not living with their natural father, nor were they visiting their grandparents. Instead, sometime before Johnson arrived, Bass and Dixon locked Larry and Gary in the basement, bound their hands and feet together with rope, and gagged their mouths with socks. Bass and Dixon threatened the other three children with starvation and beatings if they told Johnson the truth about their brothers' treatment or their whereabouts.

B. Procedural History

Following the criminal convictions, Forrester filed this lawsuit, contending Johnson's and Rosa's noncompliance with mandatory state-created procedures violated Larry's and Gary's federal due process rights as well as state law. Johnson and Rosa moved for summary judgment, arguing they are entitled to qualified immunity because Forrester cannot prove any violation of clearly established constitutional rights. Johnson and Rosa further claim they owed no duty to Larry and Gary because the boys were not in state custody.

The district court analyzed the plain language of sections 210.109[3] and 210.145[4] of the Missouri Revised Statutes and

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[3] Mo. Rev. Stat. § 210.109.3 established procedures for the state's child protection system, and provided, in pertinent part, that DFS

shall:

(2) Forward the report to the appropriate division staff who shall determine, through the use of protocols developed by the division, whether an investigation or the family assessment and services approach should be used to respond to the allegation. . . . *The division may investigate any report, but shall conduct an investigation involving reports, which if true, would constitute violation of section 565.050, [first-degree assault], . . .568.030 [abandonment], 568.045 [endangerment in first degree], 568.050 [endangerment in second degree], 568.060 [abuse], . . . or an attempt to commit any such crimes;*

. . . ;

(4) *Contact the appropriate law enforcement agency upon receipt of a report of a violation of [the above statutes, inter alia]. . ., or an attempt to commit any such crimes, and shall provide such agency with a detailed description of the report received.*

. . . ;

(5) Cause a thorough investigation or family assessment and services approach to be initiated within twenty-four hours of receipt of the report from the division, . . . *If the report indicates the child is in danger of serious physical harm or threat to life, an investigation or family assessment and services approach shall include direct observation of the subject child within twenty-four hours of the receipt of the report;*

. . . ;

(8) *Provide services, in cases in which the family assessment and services approach is used. . .* ;

. . . .

Mo. Rev. Stat. § 210.109 (Supp. 1998) (emphasis added).

[4] Section 210.145, establishing a telephone hot line and central registry for child abuse reports, in pertinent part, provided:

> 5. *Upon receipt of a report, which, if true, would constitute violation of section . . . 565.050 [first-degree assault], . . ., 568.030 [abandonment], 568.045 [endangerment in first degree], 568.050 [endangerment in second degree], 568.060 [abuse], . . . or an attempt to commit any such crimes, the local office shall contact the appropriate law enforcement agency and provide such agency with a detailed description of the report received. . . . The local division office shall request the assistance of the local law enforcement agency in . . . investigation of the complaint* . . . .
>
> 6. The local office of the division shall cause a thorough investigation to be initiated immediately or no later than within twenty-four hours of receipt of the report from the division, . . . *If the report indicates the child is in danger of serious physical harm or threat to life, an investigation shall include direct observation of the subject child within twenty-four hours of the receipt of the report.*
>
> . . . .
>
> 10. Protective or preventive social services shall be provided by the division to the family and subject child and to others in the home to prevent abuse or neglect; to safeguard their health and welfare; and to help preserve and stabilize the family whenever

determined these statutes clearly establish certain rights for children and families who enter the Missouri social services system through reports of abuse or neglect. The district court identified these rights as being: "(1) The right to have reports of abuse investigated by division employees, when the report indicates a possible violation of certain criminal laws, or indicates that the child is in danger of physical harm or threat to life; (2) The right to have the appropriate law enforcement agency contacted and provided a description of the report, and to have division employees request the assistance of the local law enforcement agency; and (3) The right to preventive and protective services to prevent abuse or neglect." Additionally, the district court determined these statutory sections assign DFS employees the duties of updating the information system and maintaining records, and observing directly, within twenty-four hours, a child reported to be in danger of serious physical harm.

Flowing from these statutory duties, the district court reasoned the "plaintiffs had a property interest in the rights conferred by [sections] 210.109 and 210.145, specifically in the right to an investigation of the report that their mother was abusing them, and the right to preventive and protective services provided by the state." In a footnote, the court noted Johnson and Rosa owed the plaintiffs the initial protective service of contacting law enforcement and requesting their assistance in the investigation of the case.

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possible. . . .

. . . .

Mo. Rev. Stat. § 210.145 (1994) (emphasis added).

In analyzing the substantive due process claims, the district court found the "plaintiffs had a property interest in their right to a child abuse investigation, as well as a liberty interest in bodily integrity and, naturally, a fundamental right to life." The court expounded:

> Melissa Johnson should have known that proceeding to conduct a family assessment of the Bass case despite knowing the report called for an investigation would deprive plaintiffs of their clearly established right to a child abuse investigation. . . . Melissa Johnson and Kimberly Rosa should have known that making material omissions and false statements on the evaluation form and closing the Bass case prematurely would deprive plaintiffs of clearly established rights to an investigation and to preventive and protective services. Defendants therefore are not entitled to qualified immunity on plaintiffs' substantive due process claims

The district court denied summary judgment on the federal due process claims, but granted summary judgment on the state law claims because the defendants had engaged in discretionary acts and were entitled to official immunity. Forrester does not appeal the dismissal of his state law claims.

II. DISCUSSION

We must determine whether Johnson's and Rosa's failure to comply with mandatory state-created procedures outlined in sections 210.109 and 210.145 constituted procedural and substantive due process violations protected under the Fourteenth Amendment. For purposes of this appeal, we assume Johnson and Rosa failed to perform their mandated

statutory duties by not: (1) conducting an investigation; (2) directly observing Larry and Gary Bass within twenty-four hours of the hot line call; (3) contacting law enforcement, providing a detailed description of the abuse report, and requesting law enforcement assistance with an investigation; and (4) providing preventive and protective services.

Rosa and Johnson appeal the district court's denial of summary judgment, finding Rosa and Johnson are not protected by qualified immunity. Generally, we do not have jurisdiction to decide an appeal arising from the denial of summary judgment; however, under the collateral order doctrine, an order denying qualified immunity is immediately appealable. *Behrens v. Pelletier*, 516 U.S. 299, 307, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996); *Beck v. Wilson*, 377 F.3d 884, 888-89 (8th Cir. 2004).

A. Qualified Immunity

We review de novo a denial of qualified immunity. *McCoy v. City of Monticello*, 342 F.3d 842, 846 (8th Cir. 2003). Rosa and Johnson are entitled to qualified immunity unless their alleged conduct violated "clearly established statutory or constitutional rights of which a reasonable person [in their positions] would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The law is clearly established if it gives the defendant officials "fair warning" that their conduct violated an individual's rights when the officials acted. *Hope v. Pelzer*, 536 U.S. 730, 739-40, 153 L. Ed. 2d 666, 122 S. Ct. 2508 (2002).

In *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001), the Supreme Court framed the threshold question: "Taken in the light most favorable to the

party asserting the injury, do the facts alleged show the [officials'] conduct violated a constitutional right?" "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable official that [her] conduct was unlawful in the situation [she] confronted." *Id.* at 202. Officials do not lose their qualified immunity because of a mistaken, yet reasonable belief, nor do officials lose their immunity because of a reasonable mistake as to the legality of their actions. Id. at 205-06; McCoy, 342 F.3d at 846. Guided by these principles, we now proceed to analyze whether sections 210.109 and 210.145 of the Missouri statutes create property or liberty interests protected under the Fourteenth Amendment.

B. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment guarantees that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 2. Property interests protected by due process are not created by the Constitution but, rather, "are created and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985) (citation omitted). The Supreme Court has ruled "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*

v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

Attempting to sidestep *DeShaney*, Forrester argued, and the district court agreed, the due process claims in Count I are not based on the Due Process Clause, but instead are based on Missouri's child protection statutes that confer on abused and neglected children an entitlement to receive investigative as well as preventive and protective services. *DeShaney* expressly declined to consider whether the relevant child protection statutes gave the plaintiff an "entitlement" to due process protection. Id. at 195 n.2. As such, we agree *DeShaney* does not expressly control the procedural due process claims.

Our analysis begins by examining first whether the child protection statutes at issue confer any protected interests. Only if we find a protected interest do we examine whether the deprivation of the protected interest was done in accordance with due process. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989). *In Board of Regents v. Roth*, 408 U.S. 564, 576, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), the Supreme Court defined a property interest as an interest "a person has already acquired in specific benefits." The Court explained that to have a property interest in a benefit, an individual claiming the interest "must have more than an abstract need or desire . . . [or] a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

A state-created liberty interest arises when a state imposes "substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983). We determine whether a state law creates an

enforceable liberty interest by "examining closely the language of the relevant statutes and regulations." *Thompson*, 490 U.S. at 461. "The most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* at 462 (citation omitted). The Court also articulated a requirement that statutes and regulations must contain "'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." Id. at 463. "In sum, the use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the State has created a liberty interest." *Id.*

Sections 210.109 and 210.145 charged DFS personnel with the duties of receiving reports of child abuse and neglect, and determining whether a family assessment and services approach or an investigation should be employed to respond to the report. *See* Mo. Rev. Stat. § 210.109.3(1)-(2) (Supp. 1998). In cases in which a child abuse report, if true, would constitute a crime or attempted crime against the subject child or children, the statutes required DFS personnel to conduct an investigation, contact the appropriate law enforcement agency, provide law enforcement with a detailed report, and request its assistance. *Id.* §§ 210.109.3(3)(4); 210.145.5 (1994). The statutes also mandated that, within twenty-four hours of receiving such a report, DFS personnel must initiate a thorough investigation, including direct observation of any subject child or children reported to be in danger of serious physical harm or threat of life. *Id.* §§ 210.109.3(5); 210.145.6. Furthermore, the statutes required DFS personnel to provide protective and preventive services to the subject

child or children and to others in the home. *Id.* §§ 210.109.3(8), (12), (16)-(17); 210.145.10-11.

We have not considered previously whether these challenged Missouri child protection statutes bestow upon reportedly abused children a property or liberty interest in social services. We have, however, previously considered an identical issue in the context of a Minnesota child welfare statute and related procedural regulations, and determined they neither "bestow . . . a property interest in social services[,]" nor "create a constitutional liberty interest in due process." *Doe v. Hennepin County*, 858 F.2d 1325, 1328 (8th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437, 1469 (8th Cir. 1987), *abrogated on other grounds*, *Burns v. Reed*, 500 U.S. 478, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991). The Minnesota statute at issue in both cases-section 626.556 of the Minnesota Statutes-imposed a reporting duty on individuals with knowledge of child abuse or neglect, and investigative and record-keeping duties on law enforcement authorities and social service agencies that receive child abuse reports, as well as duties on local welfare agencies to offer protective social services. See Myers, 810 F.2d at 1469 (citing Minn. Stat. Ann. § 626.556 (West 1983 and Supp. 1987)).

In *Myers*, we concluded the Minnesota child welfare statute, at most, "establishes guidelines to be followed as a matter of state law and neither confers nor embodies any constitutionally-protected right." *Id.* The following year, in Doe, we noted that, although the plaintiffs "desired or even expected the social services set forth in the Minnesota statute, they had no legitimate claim of entitlement." Doe, 858 F.2d at 1328. We explained in *Doe* that in order to have a legitimate entitlement, the benefit must be specific, i.e., clearly definable, and we provided several examples of clearly definable benefits, including public assistance, social

security income, and unemployment benefits. Id. In contrast to these specific benefits, we explained the provision of Minnesota's statutorily defined "social services is qualified by the considerable discretion placed in the hands of those who administer it." *Id.* at 1329. We also noted the "lack of specificity of the Minnesota statute." *Id.*

The Minnesota statute examined in *Doe* and *Myers* is not identical to the Missouri statutes relied upon here, and the facts in *Doe* and *Myers*, both of which involved the emergency removal of children from parental custody following reported child abuse, are converse to those before us. Nonetheless, we conclude the legal reasoning employed in these earlier cases should apply. Similar to the Minnesota statute, sections 210.109 and 210.145 of the Missouri statutes codify procedures for administering the state's child protection system, the telephone hot line, and the central registry. Sections 210.109 and 210.145 contain "explicit mandatory language," e.g., an investigation is required when a child abuse report, if true, would constitute a crime or attempted crime against a child; notification of law enforcement, with a request for assistance, and direct observation of the child within twenty-four hours are also required under the same circumstances; and social services must be provided to the child and family.

Despite explicit language requiring DFS officials to comply with certain procedures, the statutes contain no substantive predicates expressly limiting the discretion of DFS officials "by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *See Thompson*, 490 U.S. at 462 (citation omitted). The statutes do not mandate the particular substantive outcomes of required investigations, law enforcement notification and intervention, direct observation of subject children, and the provision of

social services. *See* Mo. Rev. Stat. §§ 210.109(3)-(5), (8), (12), (16)-(17) (Supp. 1998); 210.145.5-.6, .10-.11 (1994). Nor do the statutes define mandatory social services, or dictate how, when, or for how long these social services must be provided. Instead, the statutory language simply mandates particular preliminary actions be undertaken and authorizes the provision of social services, thereby leaving the particular substantive outcome in each case to the sound discretion of trained social workers and law enforcement officers. *See id.*

We agree with the Second Circuit's ruling that where an administrative process does not require specific substantive outcomes, but merely *authorizes and directs* particular actions and remedies, the administrative process does not create "entitlements" subject to constitutional protections under the Fourteenth Amendment. *See Sealed v. Sealed*, 332 F.3d 51, 56 (2d Cir. 2003). Other circuits, analyzing similarly drafted child welfare statutes, have reached this same conclusion. *See Doe v. Dist. of Columbia*, 320 U.S. App. D.C. 198, 93 F.3d 861, 868 (D.C. Cir. 1996) (declaring "process alone does not give rise to a protected substantive interest: by codifying procedures for investigating child abuse and neglect reports, D.C. has not assumed a constitutional obligation to protect children from such abuse and neglect"); *Tony L. v. Childers*, 71 F.3d 1182, 1186 (6th Cir. 1995) (ruling state-created procedural rights "only give Plaintiffs an expectation that a certain procedure will be followed," and declaring "an expectation that some sort of action will be taken is not enough. . . . [A] plaintiff must have an expectation that a particular result will follow from a particular, required action."); *Doe v. Milwaukee County*, 903 F.2d 499, 503-04 (7th Cir. 1990) (rejecting a procedural due process claim for failing to investigate child abuse, finding no "entitlement" in such procedures, and ruling the "procedures themselves are

not 'benefits' within the meaning of Fourteenth Amendment jurisprudence").

Recently, in a case filed by children alleging abuse while in foster care, a recognized exception under *DeShaney*, the Second Circuit ruled that "the detailed and comprehensive procedures for investigating potential child abuse mandated by state law[,] . . . standing alone, create no independent *substantive* entitlements, whose deprivation might trigger application of the Due Process Clause." *Sealed*, 332 F.3d at 57. The Second Circuit reasoned that "'elevating a state-mandated procedure to the status of a constitutionally protected' liberty or property interest, would make process 'an end in itself' rather than a requirement whose 'constitutional purpose is to protect a substantive interest in which the individual has a claim of entitlement.'" *Id.* at 57 n.5 (citation omitted).[5]

Thus, based on the plain statutory language and court precedent, we hold sections 210.109 and 210.145 of the Missouri Revised Statutes, which were in effect in August

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[5] Because the children were in state custody and the court determined the mandatory statutory language-"*shall authorize* any employee of the department or any law enforcement officer to remove the child . . . from such surroundings without the consent of the child's parent or guardian"-was ambiguous, the Second Circuit certified to the Connecticut Supreme Court the question whether the mandatory "shall authorize" language required emergency removal of the plaintiffs or only authorized the Commissioner to seek emergency removal based on the exercise of discretionary judgment. *Id.* at 59-60. The Missouri statutes relied upon in this case do not mandate or otherwise authorize emergency removal by DFS or law enforcement officials of children believed to be in imminent danger of physical harm.

1999, did not create specific, constitutionally protected property or liberty interests in state-created investigative, preventive, and protective social services. Finding no protected interests, we need not decide what, if any, procedural process was due.

C. Substantive Due Process

Forrester also claims the failure of Johnson and Rosa to comply with state-created statutory procedures violated Larry's and Gary's substantive due process rights to bodily integrity and their fundamental rights to life. While *DeShaney* does not control Forrester's procedural due process claims, *DeShaney* squarely forecloses his substantive due process claims. Declaring a state has no general duty to protect individuals from abuse committed by private actors, *DeShaney*, 489 U.S. at 197, the Supreme Court acknowledged a state may owe an affirmative duty to protect individuals when they are placed in state custody, or when the state acts affirmatively to create the danger to which the individuals become subject. *See id.* at 198-201; *Burton v. Richmond*, 370 F.3d 723, 727 (8th Cir. 2004). As DFS never placed Larry and Gary in state custody, the special custodial relationship theory does not apply.

Alternatively, Forrester advances a state-created danger theory, contending Johnson's and Rosa's affirmative acts of jointly filing the Bass family assessment report with material omissions and false representations rendered Larry and Gary, as well as their siblings, more vulnerable to continued child abuse and ensured preventive and protective social services would not be provided to the Bass family. In *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990), we recognized the *DeShaney* "analysis establishes the possibility that a constitutional duty to protect an individual against private

violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action."

Forrester argues the filing of a false family assessment report and the failure to follow state protective procedures increased Larry's and Gary's vulnerability to continued abuse and deprived them and their family members of critical social services. The record, however, simply does not substantiate the requisite causal connection. The filing of the Bass family assessment report and other acts by Johnson and Rosa were not affirmative acts of endangerment, which "created greater risks to [the Bass children] than the ones to which [they were] originally exposed." *S.S. v. McMullen*, 225 F.3d 960, 963 (8th Cir. 2000) (en banc). Instead, as the majority found in S.S., the state action here was effectively "the same as if [the state] had done nothing." *Id.* In *DeShaney*, the state once had taken temporary custody of the child; even so, the Supreme Court reasoned:

> When [the State] returned [the boy] to his father's custody, [the State] placed him in no worse position than that in which he would have been had [the State] not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect [the boy].

489 U.S. at 201. In this case, the State of Missouri never had custody of Larry and Gary, and Johnson's and Rosa's actions, at most, left the Bass children in the same perilous situation that existed on August 16, 1999, when DFS responded to the

hot line call. No constitutionally recognized causal nexus exists.

Even if Forrester could establish a sufficient causal connection between state action and the ensuing private acts of violence, his substantive due process claims still must fail because Forrester cannot demonstrate the requisite degree of offensive conduct or deliberate disregard by Johnson and Rosa necessary to establish substantive due process violations. "Before official conduct or inaction rises to the level of a substantive due process violation[,] it must be so egregious or outrageous that it is conscience-shocking." *Burton*, 370 F.3d at 729. The dreadful abuse suffered by the Bass children was egregious. But private parties, not state actors, inflicted the severe physical abuse that killed Larry and Gary.

While we do not condone any official negligence contributing to this tragic case, we conclude Johnson and Rosa did not engage in official conduct so egregious or outrageous as to shock the contemporary conscience. *See County of Sacramento v. Lewis*, 523 U.S. 833, 848 n.8, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). The record does not portray Johnson as an apathetic or dilatory social worker who saw and ignored wanton child abuse. Based upon what transpired inside the Bass home on August 17, 1999, Johnson's failure to conduct an investigation, to contact law enforcement, and to verify the whereabouts of the boys, while erroneous, and maybe naive in retrospect, cannot be considered conscience-shocking. Johnson took what she saw and what she heard at face value. Only after the two young boys died did everyone realize Johnson had misjudged the actors and the scene.

Nor was Rosa's supervisory conduct conscience-shocking. While Rosa should not have filled in missing information on

Johnson's report and completed the safety assessment without personal knowledge of the conditions inside the Bass home and the well-being of each family member, her actions were neither egregious nor outrageous. Rosa simply extrapolated from erroneous information contained in Johnson's report. The record contains no evidence that either Rosa or Johnson (1) knew their representations were false, or (2) deliberately disregarded a known risk of harm to the Bass children.

This case manifests exceptionally depraved conduct by two private individuals. Johnson's and Rosa's conduct, while arguably negligent, clearly does not descend to this base level. The Supreme Court in *DeShaney* explained the emotional and constitutional balancing as follows:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [victims and their families] to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State . . ., but by [the parent]. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the [child] away from the [parent], they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

DeShaney, 489 U.S. at 202-03. We conclude Forrester failed to plead viable substantive due process claims.

III. CONCLUSION

State courts, and not federal courts, are the appropriate forum to enforce state child protection laws. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (declaring "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). A federal court should not usurp state power by enforcing state-created procedures that guarantee no substantive outcomes.

Because Forrester cannot demonstrate the Missouri statutes establish a property or liberty interest protected under the Fourteenth Amendment and because Johnson's and Rosa's conduct does not shock the contemporary conscience, Forrester has failed to allege a violation of a clearly established due process right, and Rosa and Johnson are entitled to qualified immunity. We reverse the denial of qualified immunity for Rosa and Johnson and remand the case to the district court for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 02-01104-CV-W-REL

[Filed, April 6, 2004]

D. SCOTT FORRESTER, et al.,)
Plaintiffs,)
)
v.)
)
MARY BASS, et al.,)
Defendants.)
)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the court is defendants Melissa Johnson and Kimberly Rosa's motion for summary judgment. In support of their motion, defendants state that there is no genuine issue of material fact and claim they are entitled to judgment as a matter of law. Defendants argue that, under the rule of *DeShaney v. Winnebago County Department of Social Services*, their actions did not violate substantive due process because the decedents were not in the custody of the state.

Defendants argue further that the only stated claim against defendant Kimberly Rosa is under the doctrine of *respondeat superior,* which is not a valid basis for liability under § 1983. Defendants also claim they are entitled to qualified immunity from suit, even if constitutional violations could be established. As to plaintiffs' state law claims, defendants state they are protected by official immunity in the exercise of their discretionary duties, and that the public duty doctrine shields defendants from liability to plaintiffs.

I. STANDARD FOR SUMMARY JUDGMENT

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The movant bears the burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). If the movant does not bear the burden of proof at trial, that party must show "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. When considering summary judgment motions, the court is to believe the evidence of the non-movant and draw all reasonable inferences in the non-movant's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

II. FACTS

Based on the parties' suggestions and the relevant affidavits and exhibits, I find the following undisputed material facts:

1. In August of 1999 and continuing until their deaths in October of 1999, Gary Bass and Larry Bass had notbeen

taken into the custody of the State of Missouri's Division of Family Services (DFS), but lived with their mother, Mary Bass. The parties dispute whether Mary Bass offered custody to DFS.

2. On August 16, 1999, DFS received a hotline call about the Bass children, including Catina Bass, Ron Bass, Jerry Bass, Gary Bass, and Larry Bass.

3. The hotline call was received in Jefferson City by a DFS worker other than Melissa Johnson or Kim Rosa.

4. A DFS worker named Mark Waiters assigned the hotline call to Melissa Johnson, a DFS social worker who, at the time of the call, conducted family assessments in Jackson County, Missouri.

5. Ms. Johnson arrived at the Bass home on August 16, 1999, and found Tony Dixon was the only person home. Mr. Dixon told her that the children were not at home.

6. Ms. Johnson talked to Mary Bass on the telephone later.

7. On August 17, 1999, Ms. Johnson went to the Bass home again and talked to Catina Bass, Ron Bass, and Jerry Bass.

8. Ms. Johnson was told that Gary Bass and Larry Bass were with their father.

9. Ron Bass, Jr. said everything was all tight with the food. The parties dispute whether there was an inquiry about food for Larry and Gary Bass.

10. At the time of the visit, Mary Bass was cooking food in the kitchen that Ms. Johnson could smell in the living room.

11. At the time of the visit, the living room was very clean. The parties dispute whether the rest of the house was clean, and whether Ms. Johnson saw enough of the house to attest to its cleanliness.

12. Mary Bass and the three children interviewed by Ms. Johnson denied all the allegations referred to in the hotline report. The parties dispute whether Ms. Johnson spoke to any of the Bass children outside the heating of their mother.

13. Ms. Johnson prepared a Family Assessment form based on her visit with the Bass family and concluded that the children were safe. The parties dispute whether Ms. Johnson actually completed this form.

14. Ms. Johnson communicated to Mary Bass by letter on September 7, 1999, that the file was being closed.

15. After Ms. Johnson completed the assessment, the family assessment form went in a box for her supervisor to review.

16. In August 1999, Ms. Rosa was a supervisor within the DFS working in Jackson County and supervising Melissa Johnson.

17. On the date the hotline call came in, Ms. Rosa was not at work but rather on vacation.

18. On or before September 23, 1999, Ms. Rosa reviewed the report prepared by Ms. Johnson.

19. In reviewing that report, Ms. Rosa found that Ms. Johnson had not checked off the boxes on a portion of the report, though she had signed the bottom of the page indicating that she had done the safety assessment.

20. Ms. Rosa drew a line through the "No" boxes to indicate that the answer to all questions was "No" and signed her name to the form. The parties dispute whether Ms. Rosa believed, from the information available in the report, that Ms. Johnson's answer to all of the questions would be "No," or whether Ms. Rosa had actual knowledge that Ms. Johnson had not seen Gary and Larry Bass.

21. Weeks after the visit byMs. Johnson, MaryBass scalded the legs of Gary Bass and Larry Bass.

22. Gary Bass and Larry Bass died in October of 1999, after being scalded by Mary Bass.

In addition to the above undisputed facts, plaintiffs offer lengthy additional facts, virtually all of which are disputed by the parties. In support of these facts, defendants offer deposition testimony and the affidavit of Mary Bass.

Defendants have objected to plaintiffs' use of Mary Bass's affidavit, stating that Mary Bass refused to participate in her deposition noticed by defendants. They argue that the court should not consider an affidavit in opposition to summary judgment when the affiant refuses to give a deposition. In support of this argument, defendants cite *Tolliver v. Federal Republic of Nigeria,* 265 F. Supp. 2d 873 (W.D. Mich. 2003). In *Tolliver,* the district court found that the affiant had essentially recanted his statement by asserting his Fifth Amendment right against self-incrimination. The court found that permitting the plaintiffs in that case to use the affidavit in

opposing summary judgment would be "grossly unfair" to the defendants "given their inability to test the statements through discovery and cross-examination." *Tolliver,* 265 F. Supp. 2d at 876. That case and the cases cited by the *Tolliver* court are distinguishable from the instant case, as Mary Bass never asserted her Fifth Amendment rights in refusing to give a deposition. In reading the transcript of the attempted deposition, I find that Mary Bass refused to speak on record or on video, stating words to the effect that "[the attorneys] didn't understand. That [they are] in the free world and she's inside the penitentiary." Dft's Ex. J at 7. Neither party filed a motion to compel Ms. Bass to give a deposition.

Plaintiffs were apparently able to obtain Mary Bass's voluntary statement, and there is no indication that defendants even attempted an alternative means of questioning their co-defendant. Defendants state that they submitted requests for production to the plaintiffs, asking for copies of any statements obtained from Mary Bass, and plaintiffs objected to the request as seeking work product of counsel. Neither party asked the court to intervene in that discovery dispute. I can find no legal basis for denying the use of Mary Bass's statement simply because she refused at one time to give a deposition. There is nothing to indicate that the Fifth Amendment will insulate Ms. Bass from questioning by her co-defendants, and if this case goes to trial, she will not have the luxury of refusing to speak on the record. Defendants' objection to plaintiffs' use of Mary Bass' s affidavit will therefore be overruled.

The additional facts proffered by plaintiffs touch on issues material to this case, including defendant Melissa Johnson and Kimberly Rosa's knowledge of circumstances in the Bass home, Melissa Johnson's actions in performing the assessment, and the truthfulness of statements made on

the family assessment report. Also at issue are facts relevant to whether Melissa Johnson and Kimberly Rosa owed a duty of care to the Bass children, whether their actions breached that duty, and whether any breach of duty deprived plaintiffs of any statutory or constitutional rights. These disputed facts make summary judgrnent on plaintiffs' § 1983 claims inappropriate, and so defendants' motion will be denied in part.

III. DISCUSSION

The Due Process Clause of the Fourteenth Amendment guarantees that a state shall not deprive a person of "life, liberty, or property, without due process of law." In this case, plaintiffs claim that defendants Johnson and Rosa denied them procedural and substantive due process in their handling of the hotline report. Specifically, plaintiffs claim that defendant Melissa Johnson improperly conducted a family assessment, rather than an investigation of the hotline report, and that defendants Johnson and Rosa made false statements on the final evaiuation form and prematurely closed the case on the Bass children. Plaintiffs also claim Ms. Johnson made statements to Ms. Bass that may have increased the danger to the Bass children. This conduct, plaintiffs argue, deprived them of constitutional and statutory rights without due process of law. In Count II of their petition, plaintiffs assert state law claims against defendants Johnson and Rosa for wrongful death and negligence.

Defendants Johnson and Rosa argue that they are entitled to qualified immunity because plaintiffs cannot prove any violation of clearly established constitutional rights. Defendants argue, further, that a violation of state law does

not give rise to § 1983 liability, and that allegations of mere negligence cannot support a § 1983 claim.[6]

A. Count I--Due Process Claims

Defendants state that they are entitled to summary judgment on Count I of plaintiffs' complaint for two reasons: first, because they are protected from suit by the doctrine of qualified immunity; and second, because defendants owed no duty to plaintiffs because plaintiffs were not in the custody of the state. The issue of whether defendants are entitled to qualified immunity is the predominant one in this case. Defendants' second basis for summary judgment will be taken up in the discussion of qualified immunity.

"Government officials who perform discretionary functions are entitled to qualified immunity unless their conduct violated clearly established federal constitutional or statutory rights of which a reasonable person in their positions would have known." *Ottman v. City of Independence,* 341 F.3d 751,756 (8th Cir. 2003). Under the doctrine of qualified immunity, state officials are shielded from liability, even when they act wrongly, unless the law gives them fair warning that their conduct violates an individual's rights. *McCoy v. City of Monticello,* 342 F.3d 842, 846 (8th Cir. 2003). In determining whether a government official is entitled to qualified immunity, courts must ask "first whether,

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[6] Defendants also argue that plaintiffs' only cause of action against defendant Kimberly Rosa is under the doctrine *of respondeat superior,* which is no basis for a § 1983 claim. Plaintiffs have clearly sued Ms. Rosa for her own actions related to this case, and they do not base their claims against her on the mere fact that she was Ms. Johnson's supervisor. I therefore reject this argument without further discussion.

taken in the light most favorable to the plaintiff, the facts alleged show the officer's conduct violated a constitutional right, and second, whether, in the specific context of the case, the right was clearly established." *Swipies v. Kofka,* 348 F.3d 701,703 (8th Cir. 2003).

Defendant argues that § 1983 claims cannot arise from violations of state law, citing *Ebmeier v. Stump,* 70 F.3d 1012 (8th Cir. 1995). In fact, in *Ebmeier,* the Eighth Circuit held that a violation of state law cannot *by itself give* rise to a claim under § 1983. *Ebmeier,* 70 F.3d at 1013. The Supreme Court and the Eighth Circuit have both recognized that state law can create individual rights that are then protected by the Due Process clause. *Davis v. Schrerer,* 468 U.S. 183 (1984); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972); *Sellers v. Baer,* 28 F.3d 895 (8th Cir. 1994); *Vruno v. Schwarzwalder,* 600 F.2d 124 (8th Cir. 1979). Deprivations of rights created by state law can give rise to § 1983 claims if the state fails to provide adequate due process. *Roth,* 408 U.S. at 577.

The Supreme Court has set out the test for determining when officials lose qualified immunity by violating clearly established statutory rights. *Davis,* 468 U.S. at 190-94. Under the *Davis* test, officials do not forfeit qualified immunity by violating some collateral statute or regulation, *Id.* at 194 n. 12. Only when there is a clear violation of the statutory rights that give rise to the cause of action do state officials become liable for damages, and then only with respect to the damages caused by that violation. *Id.*

Under V.A.M.S. 210.109 and 210.145, plaintiff Jerry Bass and his brothers Larry and Gary Bass ("plaintiffs") were entitled to have the hotline report of abuse by their mother

investigated by DFS employees. V.A.M.S. 210.109 states, in pertinent part, as follows:

> 3. In implementing the child protection system, the division shall:
>
> (1) Receive and maintain reports pursuant to the provisions of subsections 1 and 2 of section 210.145;
>
> (2) Forward the report to the appropriate division staff who shall determine, through the use of protocols developed by the division, whether an investigation or the family assessment and services approach should be used to respond to the allegation. The protocols developed by the division shall give priority to ensuring the well-being and safety of the child. The division may investigate any report, but shall conduct an investigation involving reports, which if true, would constitute a violation of section 565.050, RSMo [assault], if the victim is a child less than eighteen years of age ....568.045 [endangerment], 568.050 [endangerment], [or] 568.060 [abuse],... or an attempt to commit any such crimes; ...
>
> (4) Contact the appropriate law enforcement agency upon receipt of a report of a violation of [the above statutes, *inter alia],* or an attempt to commit any such crimes, and shall provide such agency with a detailed description of the report received. The appropriate law enforcement agency shall assist the division in the investigation or provide the division, within a reasonable time, an explanation in writing detailing the reasons why it is unable to assist;

(5) Cause a thorough investigation or family assessment and services approach to be initiated within twenty-four hours or receipt of the report from the division ....*If the report indicates the child is in danger of serious physical harm or threat to life, an investigation or family assessment and services approach shah include direct observation of the subject child within twenty-four hours of the receipt of the report;*

(6) Investigate, if it is determined that an investigation is necessary, in compliance with the provisions of section 210.145;

(7) Assess, in cases where the family assessment and services approach is used, any service needs of the family. The assessment of risk and service needs shall be based on information gathered from the family and other sources;

(8) Provide services, in cases in which the family assessment and services approach is used, which are voluntary and time-limited unless it is determined by the division based on the assessment of risk that there will be a high risk of abuse or neglect if the family refuses to accept the services. The division shall identify services for families where it is determined that the child is at high risk of future abuse or neglect. The division shall thoroughly document in the record its attempt to provide voluntary services and the reasons these services are important to reduce the risk of future abuse or neglect to the child. If the family continues to refuse voluntary services or the child needs to be protected, the division may commence an investigation;

(9) Commence an immediate investigation if at any time during the family assessment and services approach the division determines that an investigation, as delineated in sections 210.109 to 210.183, is required. The division staff who have conducted the assessment may remain involved in the provision of services to the child and family;

(10) Document at the time the case is closed, the outcome of the family assessment and services approach, any service provided and the removal of risk to the child, if it existed;

(11) Conduct a family assessment and services approach on reports initially referred for an investigation, if it is determined that a complete investigation is not required. If law enforcement officers are involved in the investigation, they shall provide written agreement with this decision. The reason for the termination of the investigative process shall be documented in the record;

(12) *Assist the child and family in obtaining services,* if at any time during the investigation it is determined that *the child or any member of the family* needs services; ...

(16) Provide services as required by section 210.145;

(17) Use multidisciplinary services as required by section 210.145;

(18) Update the information in the information system within thirty days of an oral report of abuse or neglect ....

(19) Maintain a record which contains the facts ascertained which support the determination as well as the facts that do not support the determination.

Mo. Rev. Star. § 210.109 (emphasis added). V.A.M.S. 210.145 states, in pertinent part, as follows:

1. The division shall establish and maintain an information system [hotline] operating at all times, capable of receiving and maintaining reports ....

4. Upon receipt of a report, the division shall immediately communicate such report to its appropriate local office, after a check has been made with the information system to determine whether previous reports have been made regarding the actual or suspected abuse or neglect of the subject child, of any siblings, and the perpetrator, and relevant dispositional information regarding such previous reports. Such relevant information as may be contained in the information system shall be also reported to the local office of the division.

5. *Upon receipt of a report, which, if true, would constitute a violation of [the statutes references in § 210.109, above] or an attempt to commit any such crimes, the local office shah contact the appropriate law enforcement agency and provide such agency with a detailed description of the report received.* In such cases the local division office shall request the assistance of the local law enforcement agency in all

aspects of the investigation of the complaint. The appropriate law enforcement agency shall assist the division in the investigation or provide the division, within a reasonable time, an explanation in writing detailing the reasons why it is unable to assist.

6. The local office of the division shall cause a thorough investigation to be initiated immediately or no later than within twenty-four hours of receipt of the report from the division If the report indicates *the child* is in danger of serious physical harm or threat to life, an investigation shall include direct observation of *the subject child* within twenty-four hours of the receipt of the report.

7. The investigation shall include but not be limited to the nature, extent, and cause of the abuse or neglect; the identity and age of the person responsible therefor; the names and conditions of other children in the home, if any; the home environment and the relationship of the subject child to the parents or other persons responsible for the child's care; any indication of incidents of physical violence against any other household or family member; and other pertinent data ....

10. *Protective or preventive social services shall be provided by the division to the family and subject child and to others in the home to prevent abuse or neglect, to safeguard their health and welfare, and to help preserve and stabilize the family wherever possible.* The juvenile court shall cooperate with the division in providing such services.

11. Multidisciplinary services shall be used whenever possible in conducting the investigation and in providing protective or preventive social services, including the services of law enforcement, the juvenile officer, the juvenile court, and other agencies, both public and private ....

12. Within thirty days of an oral report of abuse or neglect, the local office shall update the information in the information system ....

13. The division shall maintain a record which contains the facts ascertained which support the determination as well as the facts that do not support the determination.

Mo. Rev. Stat. § 210.145 (emphasis added).

The plain language of these statutes clearly establishes certain rights in children and families who enter the social services system by way of reports of abuse or neglect. These rights include:

(1) The right to have reports of abuse investigated by division employees, when the report indicates a possible violation of certain criminal laws, or indicates that the child is in danger of physical harm or threat to life;

(2) The right to have the appropriate law enforcement agency contacted and provided a description of the

report, and to have division employees request the assistance of the local law enforcement agency;[7] and

(3) The right to preventive and protective services to prevent abuse or neglect, to safeguard the health and welfare of the subject child and others in the home, and,wherever possible, to help preserve and stabilize the family.

In addition to these rights, VAMS 210.109 and 210.145 assign DFS employees the duty to update the information system and maintain records of the disposition of any investigation and any attempt to provide voluntary family services. V.A.M.S. 210.145.6 requires that an investigation of a report indicating a child is in danger of serious physical harm or threat to life must include direct observation of the subject child within twenty-four hours of the report.

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[7] The local law enforcement agency, once contacted, must either assist in the investigation or provide a written explanation of why it is unable to assist. Because law enforcement agencies are given discretion in making the decision of whether to assist, children and families who have entered the social services system do not have a right to law enforcement assistance. The duty of division employees to contact the law enforcement agency, however, increases the chances that law enforcement will become involved. This is a significant responsibility because, as defendants state in their reply brief, social services officers are prohibited by statute from removing a child from a home and placing him or her in protective custody, even if the officer believes the child is in immediate danger. Mo. Rev. Stat. § 210.125. Law enforcement officers, however, do have the power to remove a child and place him or her in protective custody, *Id. The* involvement of law enforcement in investigations of serious child abuse is therefore key to the overall duty of intervention imposed by statute.

The State of Missouri has endowed employees of the Division of Family Services with broad discretion in how they carry out their duties to intervene in abusive situations and provide services to children and families in their care.[8] Cases have been filed in the past attempting to question how DFS employees have exercised that discretion. *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189 (1989); *S.S.v. McMullen,* 225 F.3d 960 (8th Cir. 2000) (considering decision by social services to return child to the custody of her father); *Doe v. Hennepin County,* 858 F.2d 1325 (8th Cir. 1988) (considering decision by social services to remove children from the custody of their parents); *Nelson v. Missouri Division of Family Services,* 706 F.2d 276 (8th

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[8] Defendants seem to argue that they had no duty to plaintiffs because the Bass children were never in state custody. This is, again, a misstatement of the law. The Supreme Court and other courts have recognized that the state has no *constitutional* duty to protect its citizens from private acts of violence, except in limited circumstances, such as when the victim is in state custody, or when a state official has acted affirmatively to increase the danger to aparticular individual. *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 195 (1989); *S.S.v. McMullen,* 225 F.3d 960, 962-63 (8th Cir. 2000). As *the Deshaney* Court recognized, states may, of course, create rights and assume duties regarding individuals who are not in state custody.

The State of Missouri has not assumed the duty to protect children from abuse by private actors, and the deprivation in this case does not lie in defendants' failure to prevent Mary Bass from murdering two of her sons. Rather, plaintiffs claim they and the deceased Bass children were deprived of certain investigative, protective, and preventive services guaranteed by state statute. The state has not undertaken the duty to provide those services to all children, nor even to all abused and neglected children, but only to those children who are the subject of reports of abuse and neglect.

Cir. 1983)(considering thoroughness of investigation conducted by DFS). These suits have failed because public policy does not allow the courts to second guess the permissible exercise of discretion by state officials. The general duty of state officials to perform their jobs diligently and skillfully does not vest an individual constitutional claim in a particular citizen who may have been wronged by a discretionary act. Social services officers should be free to exercise their discretion and even make mistakes in judgment without fear of reprisal.

This case does not involve any challenge to defendants' judgment, however, nor does it question their permissible exercise of discretion. The question here is not whether the investigation conducted by any defendant was "thorough" enough. Rather, the question is whether an investigation was conducted at all. Defendants had the discretion to decide what constituted a thorough investigation of the report. They did not have the discretion to substitute a family assessment for an investigation, to close the case before an investigation could be conducted, to deny services to a family who was entitled to them, or to act otherwise in direct violation of state law.

Defendants are entitled to qualified immunity unless plaintiffs have alleged a violation of clearly established property or liberty fights without due process Of law. I f'md that plaintiffs had a property interest in the fights conferred by V.A.M.S. 210.109 and 210.145, specifically in the fight to an investigation of the report that their mother was abusing them, and the fight to preventive and protective services provided by the state.[9]

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[9] The initial protective service defendants owed plaintiffs was to contact law enforcement and request their assistance in the

The Supreme Court has said that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 571-72 (1972). Government benefits can be property, even when the government has no constitutional duty to provide those benefits. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth,* 408 U.S. at 577. The Court went on to refer to welfare recipients in *Goldberg v. Kelly,* 397 U.S. 254, stating that those recipients "had a claim of entitlement that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But [the Court] held that they had a fight to a hearing at which they might attempt to do so."[5] *Roth,* 408 U.S. at 577.[10]

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investigation of plaintiffs' case. Other protective and preventive services may have been provided, as well, had the defendants performed their other duties as required.

[10] Plaintiffs do not claim that the state should have provided them a heating before or after defendants denied them the investigation and services to which they allege entitlement. The Eighth Circuit has recognized that there are cases that "present[] some difficulty in terms of separating a property ... interest from the procedures designed to safeguard that interest," and the instant case seems to fall into that category. *Vruno,* 600 F.2d at 130. This difficulty in distinguishing property from procedure is, perhaps, what has made federal courts reluctant to intervene in cases involving child protective services. *See Vruno,* 600 F.2d at 130 n.8. The investigation is the procedure provided by the state to safeguard families' interests in the preventive and protective services

For the purpose of their procedural due process claim, then, I find that plaintiffs had a property interest in their right to protective and preventive services. The plain language of V.A.M.S. 210.109 and 210.145 clearly establishes the right of "the subject child and the family" to receive these services.

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guaranteed by statute. The investigation is more than simply a heating substitute, however; it is a benefit in itself to a child suffering abuse or neglect--a form of state intervention in what may be unendurable circumstances. The involvement of DFS, law enforcement, and the courts confers some benefit to children and families living in the shadow of abuse, even when the only "service" provided is the attention of concerned civil servants. Investigations, then, have both procedural and substantive value to the children and families they are intended to benefit.

Child abuse investigations are a separate class of benefit from protective and preventive services. A deprivation of a child abuse investigation will never arise except as the result of some unauthorized conduct. No heating or other procedural device could realistically protect a family's right to a child abuse investigationor vindicate that right once it is deprived. The procedural hurdle to this benefit is cleared when a report of abuse or neglect is filed that meets the statutory definitions.

Protective and preventive services, however, are benefits that may be subject to separate procedural determinations of entitlement. The Missouri General Assembly, like many state legislatures, has determined that families will receive an investigation in some cases, an assessment in others, before protective or preventive services will be granted or denied. Neither of these approaches is adversarial or requires legal representation. This procedure does adequately balance the public and private interests involved, however, and addresses the practical considerations and risk of error even better than a "full-fledged heating" could do. This procedure, when followed, therefore meets the requirements of due process, as set out in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

Viewing the facts as alleged in the light most favorable to plaintiffs, I find that defendants should have known that closing the file on plaintiffs' case without investigating the report, determining which services were appropriate, or ensuring that these services were provided would deprive plaintiffs of clearly established rights without due process of law. There is no postdeprivation procedure that will adequately compensate plaintiffs for defendants' conduct; there is no appeals process for this type of deprivation, and defendants are immune from state law tort claims for discretionary acts. Defendants, therefore, are not entitled to qualified immunity on plaintiffs' procedural due process claims.

As to plaintiffs' substantive due process claim, I find that plaintiffs had a property interest in their right to a child abuse investigation, as well as a liberty interest in bodily integrity and, naturally, a fundamental right to life. Viewing the facts as alleged in the light most favorable to plaintiffs, I find that defendant Melissa Johnson should have known that proceeding to conduct a family assessment of the Bass case despite knowing the report called for an investigation would deprive plaintiffs of their clearly established right to a child abuse investigation. I find that defendant Melissa Johnson should have known that making certain statements to Mary Bass in the course of the family assessment would increase the risk of harm to the Bass children and would make it more likely that Mrs. Bass would act out of desperation on her threats to harm the children. Defendant Johnson should have known that making such statements would likely deprive plaintiffs of their right to bodily integrity and to life. I find that defendants Melissa Johnson and Kimberly Rosa should have known that making material omissions and false statements on the evaluation form and closing the Bass case prematurely would deprive plaintiffs of clearly established

rights to an investigation and to preventive and protective services. Defendants therefore are not entitled to qualified immunity on plaintiffs' substantive due process claims.

Because there exist genuine disputes of material facts in this case, defendants are not entitled to summary judgment on plaintiffs' § 1983 claims. Their motion for summary judgment as to Count I will therefore be denied.

B. Count II--State Law Claims

In their motion for summary judgment on Count II of plaintiffs' petition, defendants' primary argument is that they are entitled to official immunity under state law for their discretionary acts. Plaintiffs argue that the acts giving rise to their claims for damages were ministerial, not discretionary, and that therefore official immunity is inapplicable.

Under Missouri law, public officers are not liable in tort for injuries arising from their discretionary acts or omissions. *Kanagawa v. Missouri,* 685 S.W.2d 831,835 (Mo. 1985), *declined to follow on other grounds, Alexander v. Missouri*, 756 S.W.2d 539 (Mo. 1988). Officials may be sued in tort only for acts committed when they are acting in a ministerial capacity, *Id.* Whether an act is discretionary or ministerial depends on the degree of reason and judgment required, *Id.* at 836. The Missouri Supreme Court has stated that "a discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or [a] course pursued." *Id.* (internal quotations omitted). A ministerial act, on the other hand, is "one of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion

concerning the propriety of the act to be performed." *Rustici v. Weidemeyer,* 673 S.W.2d 762, 769 (Mo. bane 1984).

As discussed above, the particular acts that gave rise to the instant case were subject to statutory mandate. Defendants did not have the discretion to refuse to conduct an investigation of the hotline report, or to close the case file on the Bass children prematurely. However, the specific statutory requirements at issue in this case do not create a "ministerial" duty. Defendants had a great deal of discretion in how they performed their duties. The singular decision in whether to perform an investigation or a family assessment was, itself, largely discretionary. The statutes set out specific circumstances in which a family assessment was not an option, but that does not transform the performance of an investigation in those circumstances into a ministerial function. The statutes do not specifically prescribe the manner in which an investigation must be performed; they simply give guidelines that must be followed. Defendants still had to rely heavily on their own reason and judgment in conducting the investigation and in making decisions about how the case should proceed.

It serves no public policy to attempt to isolate minute acts within a broader discretionary function and to characterize those acts as "ministerial." Under federal law, defendants are liable for discretionary acts if they have fair warning that their acts violate an individual's rights. Under Missouri law, fair warning provides no exception to official immunity. Therefore, because defendants were acting in their discretionary roles, they are immune from suit on plaintiffs' state law claims. Summary judgment on Count II of plaintiffs' petition will be granted.

C. Public Duty Doctrine

Defendants rely on the public duty doctrine as an alternative ground for summary judgment on plaintiffs' state law claims. Defendants have official immunity from suit on those claims, so their argument of the public duty doctrine is moot. This doctrine is relevant to plaintiffs' § 1983 claims, however, so I shall discuss it here.

In 1856, the United States Supreme Court recognized by implication the common law public duty doctrine. *South v. Maryland,* 59 U.S. 396, 403 (1856). In 1970, the Supreme Court of Missouri adopted this rule of law, holding that an individual cause of action did not arise against a sheriff who failed to prohibit the operation of gambling games, because the duty of keeping the peace was owed only to the general public. *Parker v. Sherman,* 456 S.W.2d 577, 578 (Mo. 1970). The rule of law adopted by the Missouri Supreme Court states that a public official is liable to an individual for failure to perform a statutory duty only if the statute creates a duty to the individual, as opposed to a duty to the general public. *Sherman,* 456 S.W.2d at 578.

In 1983, the Eighth Circuit Court of Appeals upheld summary judgment in favor of DFS officials sued for failing to conduct a "thorough" investigation of a report of child abuse. *Nelson v. Missouri Division of Family Services,* 706 F.2d 276 (8th Cir. 1983). The question in *Nelson* was whether the investigation conducted by DFS employees was thorough enough to satisfy statutory requirements, *Id.* at 276-77. The district court in *Nelson* relied on the public duty doctrine to deny the plaintiffs relief, citing to the Missouri Supreme Court's decision in *Sherman. Id.* at 277. The Eighth Circuit acknowledged that the *Nelson* case may have been distinguishable from *Sherman,* however the it deferred heavily

to the district court's judgment in the absence of controlling state precedent, *Id.* at 278.

The district court's findings in *Nelson* were based on the language of V.A.M.S. 210.145, as it existed in 1983. Subsequent to *Nelson,* in 1986, the Missouri General Assembly made extensive revisions and expansions to V.A.M.S. 210.109, 210.145, and other statutes dealing with the provision of family services. I have not researched the legislative history of the pre-1986 statutes, nor have I read the full text of all of the statutes that were revised. It is possible that while particular sections remained unchanged, the statutes as a whole lacked the clear statement of intent and plain meaning of the current statutes.

Based on the reasoning in Part III.A, above, I hold that the public duty doctrine is inapplicable to the instant case. As discussed above, the plain language of V.A.M.S. 210.109 and 210.145 creates individual rights to protective and preventive services, including the right to investigations of child abuse. Missouri clearly has not undertaken a duty to provide these services to the general public, nor are the duties created to serve the interests of the general public. Instead, the language makes it clear that the duties are owed to "the subject child and the family"--that is, the special class of individual families and children who are brought into DFS jurisdiction by the filing of reports of child abuse or neglect.

The duty of DFS officials to investigate child abuse reports is not the same as the duty of police officers to keep the peace, or to investigate violations of the criminal code. The court in *Sherman* noted that the plaintiff in that case "[had] not alleged any actionable injury to himself or his property or that the sheriff failed to perform some duty which the sheriff owed to him individually." The public duty

doctrine is thus related to the general standing issue in federal courts, prohibiting suits against "generalized grievances." *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

The language of V.A.M.S. 210.109 and 210.145 makes it clear that the intention of those statutes is not to preserve the public interest in preventing child abuse and neglect, but rather to provide services to *"the family and subject child* and to others in the home to prevent abuse or neglect, to safeguard *their* health and welfare, and to help preserve and stabilize the family wherever possible." Mo. Rev. Stat. 210.145.10 (emphasis added). Plaintiffs suing DFS employees who fail to perform their duties as required by statute are alleging personal injuries. Cases based on violations of these statutes, including the instant case, do not arise from the public interest in preventing child abuse and neglect, but from deprivations of individual rights.

The applicability of the public duty doctrine does not depend on whether a criminal statute or a civil statute is at issue. *See Nelson,* 706 F.2d at 277-78. Public duties can arise from civil statutes as easily as from criminal laws. *Id.* at 278. The test is whether a plaintiff can allege an "actionable injury to himself or his property," or, as the Supreme Court of the United States has stated it, an "injury in fact." *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Sherman,* 456 S.W.2d at 579.[11] In the case of a deprivation arising from state statute, the plaintiff must also allege that the defendant "failed to perform some duty.., owed to [the plaintiff]

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[11] *In Lujan,* the Supreme Court listed two additional elements for standing: a causal connection between the action and the injury, and a likelihood that the injury will be redressed by a favorable decision. *Lujan,* 504 U.S. at 560-61.

individually." *Sherman,* 456 S.W.2d at 579. As discussed above, plaintiffs have met both of these requirements in the instant case.

This case is distinguishable from *Nelson,* as well, because the *Nelson* plaintiffs alleged merely that DFS employees were negligent in failing to conduct a "thorough" enough investigation. *Nelson,* 706 F.2d at 276-77. In the instant case, by contrast, plaintiffs allege that no investigation was conducted at all. This distinction is important because the actions of the defendants in *Nelson* were not in clear violation of Missouri statute; in the instant case, defendants' alleged failure to conduct an investigation was in direct violation of statutory mandate. *Nelson,* therefore, is not controlling in this case, and the public duty doctrine does not apply.

IV. CONCLUSION

For the above-stated reasons, it is ORDERED that defendants' motion for summary judgment is denied as to Count I of plaintiffs' petition. It is further

ORDERED that defendants' motion for summary judgment is granted as to Count II of plaintiffs' petition.

/s/Robert E. Larsen
ROBERT E. LARSEN
United States Magistrate Judge

Kansas City, Missouri
April 6, 2004

Supreme Court, U.S.
FILED
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No. 04-1703

In the
SUPREME COURT OF THE UNITED STATES

D. Scott Forrester, Conservator
of the Estate of Jerry Bass
Petitioner,

v.

Kimberly Rosa, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

ON PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Did the Eighth Circuit correctly conclude, in accordance the D.C., Sixth, and Seventh Circuits, that no procedural due process interests are created by state child welfare statutes that mandate particular preliminary actions while leaving particular substantive outcomes to the sound discretion of trained social workers and law enforcement officers?**

II. **Are Petitioner's substantive due process claims barred by *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989), where Petitioner's decedents died from child abuse inflicted by private actors (their mother and her boyfriend) and were never taken into State custody nor placed in greater danger by state actors?**

III. **Are Respondents entitled to qualified immunity where Petitioner alleged no viable procedural or substantive due process claims?**

IV. **Did the Eighth Circuit correctly conclude that Respondents' actions in improperly completing a safety assessment, *inter alia*, was not conscience-shocking where the record contains no evidence that Respondents (1) knew their representations were false, or (2) deliberately disregarded a known risk of harm to Petitioner's decedents?**

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STATEMENT OF THE CASE

1. a. In August 1999, the Missouri Department of Social Services (MDSS), Division of Family Services (DFS) received a hotline call about Mary Bass and her five children Rodney, Catina, and triplets Larry, Gary, and Jerry Bass. Pet. App. 3a. The caller reported, *inter alia*, that (1) Bass was starving her children as punishment; (2) the children appeared dehydrated and malnourished, with sunken eyes and protruding ribs, and too weak to drink unassisted; and (3) Bass had locked Rodney, the eldest son, in the basement. *Id.* 3a-4a. DFS immediately faxed the information to the appropriate office, where it was screened according to MDSS protocol, and a family assessment ordered. *Id.* 4a.

Respondent Melissa Johnson, a social worker employed by DFS, went to the Bass home to perform the assessment. *Id.* Bass's live-in boyfriend, Tony Dixon, met Johnson at the front gate and told her the children were not at home. The next day, Bass called Johnson at work, and Johnson returned and performed the assessment. *Id.* 4a-5a.

Johnson spent an hour in the Bass living room, which she observed to be very clean, and smelled food cooking in the kitchen. *Id.* 5a. She interviewed Rodney, Catina, and Jerry, who denied Bass withheld food, locked them in the basement, or otherwise abused them. *Id.* Bass similarly denied doing these things. *Id.* When asked about 8-year-olds Larry and Gary, Bass and the three other children told Johnson that the two boys were living with their natural father, although Dixon said they were visiting their grandparents. *Id.*

Based her observations, Johnson concluded the children were safe and no social services needed. *Id.* She turned in her family assessment report without checking off the boxes for a mandatory safety assessment, though she signed the bottom of the page indicating that she had done the safety assessment. *Id.*; *id.* 29a. Respondent Kimberly Rosa, a social worker and Johnson's supervisor, reviewed the report. Extrapolating from

information in Johnson's report, Rosa completed the safety assessment by drawing a line through the "No" boxes on the safety assessment, thereby certifying the Bass home was safe, without having herself seen the Bass children or visiting the home. *Id.* 5a-6a, 29a.

b. Approximately two months later, Kansas City police, fire, and emergency personnel responding to a 911 call from the Bass home found Larry dead in the living room and discovered Gary, still alive, upstairs. *Id.* 6a. Both boys were emaciated and had third degree burns on their feet and lower legs, caused when Bass forced them to put their feet in scalding bath water several weeks after Johnson's visit. *Id.*; *id.* 29a. Gary died two days later despite intensive medical treatment. *Id.* 6a. Autopsies revealed that both boys died from starvation and bacteria-infected burns. *Id.*

c. Bass was convicted of second-degree murder, armed criminal action, and child abuse and received eight life sentences and additional terms. *Id.* 6a-7a. Dixon pled guilty to child abuse and endangerment and received a 20-year sentence. *Id.* 6a. As a result of the criminal prosecutions, authorities learned that Bass and Dixon had bound and gagged Larry and Gary and locked them in the basement during Johnson's visit, and that Bass and Dixon threatened the three other children with starvation and beatings if they told Johnson. *Id.* 7a.

2.a. Petitioner D. Scott Forrester, as personal representative of the estates of Larry and Gary and as conservator of the estate of Jerry Bass, filed an action under 42 U.S.C. §1983 against Johnson and Rosa, alleging *inter alia* procedural and substantive due process violations under the 14th Amendment.[1] *Id.* 3a. Attempting to circumvent the holding of *DeShaney v. Winnebago County Department of Social Services*,

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[1]Petitioner also asserted state law claims, all of which were denied on summary judgment and not appealed to the Eighth Circuit. *See* Pet. App. 11a.

489 U.S. 189, 197 (1989), that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," the plaintiffs claimed that Missouri Revised Statutes §§ 210.109[2] and 210.145[3] conferred

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[2]Mo. Rev. Stat. § 210.109.3 provides that DFS "shall:"

"(2) .... conduct an investigation involving reports, which if true, would constitute [first-degree assault]... [abandonment, endangerment in the first degree, endangerment in the second degree]... or an attempt to commit any such crimes;

...;

"(4) Contact the appropriate law enforcement agency upon receipt of a report of a violation of [the above statutes]..., or an attempt to commit any such crimes, and shall provide such agency with a detailed description of the report received.

...;

"(5) ... If the report indicates the child is in danger of serious physical harm or threat to life, an investigation or family assessment and services approach shall include direct observation of the subject child within twenty-four hours of the receipt of the report;

....;

"(8) Provide services, in cases in which the family assessment and services approach is used ..."

[3]Section 210.145, which establishes a telephone hotline and central registry for child abuse reports, provides:

....

"5. Upon receipt of a report, which, if true, would constitute ... [first-degree assault]... [abandonment, endangerment in the first degree, endangerment in the second degree]... or an attempt to commit any such crimes, the local office shall contact the appropriate law enforcement agency and provide such agency with a detailed description of the report

on abused and neglected children an entitlement to receive investigative and preventive and protective services. 13a-14a. Further, Forrester asserted that Johnson's and Rosa's acts of filing the Bass family assessment violated substantive due process rights because the acts rendered Larry and Gary more vulnerable to continued child abuse and ensured that they would not receive preventive and protective services. *Id.* 20a. Johnson and Rosa moved for summary judgment on qualified immunity grounds and because *DeShaney* limited potential recovery to those in state custody. *Id.* 7a.

b. The magistrate judge[4] denied summary judgment, accepting Petitioner's arguments that Missouri law created clearly established procedural and substantive due process rights to preventive and protective services, and that those rights were violated when Johnson and Rosa closed the Bass file without investigating the report, failed to provide appropriate services, and made material omissions and false statements on the evaluation form. *Id.* 10a, 44a-45a.

c. The Court of Appeals reversed. After reviewing well-settled qualified-immunity principles, it held that Respondents were immune from liability "unless their alleged conduct violated 'clearly established statutory or constitutional rights of which a reasonable person [in their positions] would have known.'" *Id.* 12a (quoting *Harlow v. Fitzgerald*, 457 U.S.

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received.... The local division office shall request the assistance of the local law enforcement agency in ... investigation of the complaint....

"6. ... If the report indicates the child is in danger of serious physical harm or threat to life, an investigation shall include direct observation of the subject child within twenty-four hours of the receipt of the report ."

[4]The parties agreed to have the matter referred to a magistrate judge.

800 (1982). *See also* 12a-13a (quoting extensively from *Saucier v. Katz*, 533 U.S. 194 (2001)).

The Court next turned to Petitioner's procedural due process claims, observing that a "state-created liberty interest arises when a state imposes 'substantive limitations on official discretion.'" (Pet. App. 14a (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983))), and is demonstrated by a statute's "'use of explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion" (Pet. App. 15a (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463 (1989)). After carefully reviewing Missouri Revised Statutes Sections 210.109 and 210.145, the Court of Appeals held that they did not create specific constitutionally protected property or liberty interests in social services, because the statutes "simply mandate[] particular preliminary actions to be undertaken and authorize[] the provision of social services" while leaving "the particular substantive outcome in each case to the sound discretion of trained social workers and law enforcement officers." Pet. App. 18a. The Eighth Circuit observed that the D.C., Sixth, and Seventh Circuits likewise found no federally protected interests in "similarly drafted child welfare statutes." *Id.* (citing *Doe v. Dist. of Columbia*, 93 F.3d 861, 868 (D.C. Cir. 1996); *Tony L. v. Childers*, 71 F.3d 1182, 1186 (6th Cir. 1995); *Doe v. Milwaukee County*, 903 F.2d 499, 503-04 (7th Cir. 1990).

Finally, the Court of Appeals found Petitioner's substantive due process claims "squarely foreclos[ed]" by *DeShaney*, because DFS never placed Larry and Gary in state custody, nor acted affirmatively to create the danger to which they were subjected. *Id.* 20a. As to Petitioner's arguments that Johnson's and Rosa's acts caused Larry and Gary to experience increased vulnerability to continued abuse and deprived them of social services, the Court of Appeals held that such arguments were "not substantiat[ed]" by the record. *Id.* 21a. The record showed "at most" that Johnson and Rosa "left the Bass children in the same perilous situation that existed ... when

DFS responded to the hot line call." *Id.* 21a-22a.

And even if a causal connection between state action and Bass's ensuing private acts of violence could have been established, the Court held, Petitioner could not demonstrate "the requisite degree of offensive conduct or deliberate disregard by Johnson and Rosa necessary to establish substantive due process violations." *Id.* 22a. "Johnson's failure to conduct an investigation, to contact law enforcement, and to verify the whereabouts of the boys, while erroneous, and maybe naive in retrospect, cannot be considered conscience shocking... Only after the two young boys died did everyone realize Johnson had misjudged the actors and the scene." *Id.* Similarly, while "Rosa should not have filled in the missing information on Johnson's report ..., her actions were neither egregious nor outrageous." *Id.* 22a-23a. "Rosa simply extrapolated from erroneous information contained in Johnson's report." *Id.* 23a. "The record contains no evidence that either Rosa or Johnson (1) knew their representations were false, or (2) deliberately disregarded a known risk of harm to the Bass children." *Id.*

REASONS WHY THE WRIT SHOULD BE DENIED

I. In holding properly that Johnson and Rosa were entitled to qualified immunity after concluding that Forrester failed to show the violation of a constitutional right, the Eighth Circuit did not create a conflict among the circuits or a conflict with U.S. Supreme Court precedent as to the analytic elements of the qualified immunity defense.

Following the U.S. Supreme Court's most recent pronouncement on qualified immunity, the Eighth Circuit concluded that Forrester failed to show that a constitutional right had been violated, and granted summary judgment in favor of Johnson and Rosa. In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court announced that the proper sequence for analyzing a qualified immunity defense is to first consider whether a violation of a constitutional right has been shown. *Id.* at 201. If a right has been violated, the next step is to consider whether the right in question was clearly established at the time of the events. *Id.* But if no violation is shown, the inquiry ends. *Id.*

Forrester claimed that constitutional rights to procedural due process and substance due process were violated by Johnson and Rosa. Both Johnson and Rosa were social workers charged with making decisions about the welfare of children. In accordance with U.S. Supreme Court cases and those of the other circuit courts that have considered the issue, the Eighth Circuit found that there was no protected right in child protection procedures, and that Forrester's claim to substantive due process was completely foreclosed by *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

The Eighth Circuit first considered whether Forrester showed a violation of protected procedural due process rights. Pet. 14a. After carefully reviewing Missouri statutes on child protection procedures, the Eighth Circuit concluded that

Missouri created no protected right to investigatory procedures, applying this Courts rulings in *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454 (1972) and *Olim v. Wakinekona*, 461 U.S. 238 (1983). Pet. App. 14a, 19a-20a. Though the Eighth Circuit noted that Missouri statutes contained many mandatory procedures, the court found that the statutes did not mandate a particular result, leaving the actual outcome of the procedures to the discretion of the social worker. Pet. App. 18a. Under *Thomson* and *Olim*, if no substantive outcome is mandated, there is no protected right.

Additionally, the Eighth Circuit reviewed its own precedent and found this conclusion to be consistent with similar cases involving Minnesota child protection statutes (*Doe v. Hennepin County*, 858 F.2d 1325 (8th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987)). Pet. App. 16a. Moreover, the Eighth Circuit found its ruling in full harmony with other circuit courts of appeal that have analyzed child welfare statutes, all of which found that mandatory procedures do not create entitlements: *Sealed v. Sealed*, 332 F.2d 51 (2nd Cir. 2003); *Doe v. Dist. of Columbia*, 320 U.S. App. D.C. 198 (D.C. Cir. 1996); *Tony L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995); *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990). Having found no violation of a constitutional right, the Eighth Circuit ruled in favor of Johnson and Rosa.

The court next considered and rejected Forrester's claim of violation of substantive due process rights. Under this Court's ruling in *DeShaney*, a state has no duty to protect its citizens from abuse by private actors, unless an individual is in the custody of the state, or the state acts affirmatively to create a danger for the individual. *DeShaney*, 489 U.S. at 197-201. Larry and Gary Bass were never in the custody of the state, and the Eighth Circuit correctly ruled that Johnson and Rosa had no duty to intervene and rescue the children from their mother. Pet. App. 20a.

With respect to Forrester's claim that Johnson and Rosa created a danger to Larry and Gary, the Eighth Circuit found

that there were no affirmative acts of endangerment by Johnson or Rosa, and that the children remained in the same circumstances after Johnson's visit as they were before Johnson's visit. Pet. App. 21a. In addition to the plain and direct application of *DeShaney*, the Eighth Circuit also considered its prior cases and found consistency among the opinions: *See Burton v. Richmond*, 370 F.2d 723 (8th Cir. 2004); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000). Additionally, the Eighth Circuit concluded that the acts alleged to have been committed by Johnson and Rosa were not conscience-shocking under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

Forrester cites only *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002) as an opinion in conflict with the Eighth Circuit. *Vinyard* was an excessive force case against a police officer who arrested the plaintiff. The court noted that it must first be shown that the defendant was acting within the scope of his discretionary authority. *Id.* at 1346. The court swiftly concluded that the officer was acting within the scope of his authority because he was making an arrest. In other words, there was no issue as to whether he was acting within his authority, and the court's entire discussion of this point was limited to the one sentence. *Id.* Neither is there any issue as to whether Johnson and Rosa were acting within the scope of their discretionary authority when concluding that the Bass family did not require state intervention after Johnson's family assessment.

In spite of the fact that the Eighth Circuit explicitly found Johnson and Rosa to be acting within the discretionary authority granted by Missouri statutes (Pet. App. 18a), Forrester complains that the court failed to recite this obvious fact as part of the elements of a qualified immunity analysis. This, according to Forrester, puts the Eighth Circuit's opinion in conflict with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which stated that qualified immunity applies to acts done with in the scope of an official's discretionary authority.

But even Forrester recognizes that such recitations do not appear when the matter is not at issue. Forrester himself cites this Court's decisions in *Saucier* and *Hope v. Pelzer*, 536 U.S. 730 (2002) as examples of cases that do not specifically discuss the discretionary-ministerial distinction as part of the qualified immunity analysis precisely because the matter is not at issue.

More instructive is what Forrester fails to cite. This Court's opinion in *Davis v. Scherer*, 468 U.S. 183 (1984), considered a claim very similar to the case at bar. In *Davis*, a discharged highway patrol officer claimed that the violation of a clear statute or regulation (in that case, mandatory regulations in effecting his discharge) should deprive an official of qualified immunity from damages for a claim under federal constitutional provisions. *Id.* at 193. This Court specifically declined to adopt this rule. *Id.* at 194. This Court reasoned that the breach of a duty created by a regulation would only forfeit immunity if the breach of the regulation itself gives rise to the cause of action regardless of whether it is characterized as discretionary or ministerial. *Id.* at 196, n. 14.

The Eighth Circuit's opinion is carefully reasoned and thorough. Forrester demonstrates no conflict with prior U.S. Supreme Court cases, nor does Forrester show even the slightest inconsistency between the Eighth Circuit's opinion and any other circuit court. Accordingly, review should be denied.

II. The Eighth Circuit's ruling that Missouri statutes do not create protected entitlements is in full harmony with U.S. Supreme Court precedent as well as decisions from the Second, D.C., Sixth and Seventh and Eighth Circuits.

There is no federal constitutional right that certain state mandated procedures be followed, as such a rule would make "procedure" an end in and of itself. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983). Forrester's claim that there is a federal right to have Johnson and Rosa follow state rules for conducting investigations is just such a circumstance, and this claim was properly rejected by the Eighth Circuit. It is true that a constitutionally protectible interest may be created in a procedure where a particular outcome is mandated upon a finding that certain criteria have been met. *Thompson*, 490 U.S. at 462. But such an interest may arise only when there are specific directives to the decision maker that if certain substantive predicates are present a particular result must follow. *Thompson*, 490 U.S. 463.

Forrester declares that the "prevention of abuse" and "safeguarding of children" are the specific outcomes mandated by Missouri law, and the Eighth Circuit's ruling that no outcomes are mandated conflicts with this Court's opinion in *Thompson*. Pet. 10. But, obviously, the "prevention of abuse" and "safeguarding of children" are not outcomes at all. Accordingly, the Eighth Circuit found that Missouri statutory language, "simply mandates particular preliminary actions be undertaken and authorized the provision of social services, thereby leaving the particular substantive outcome in each case to the sound discretion of trained social workers and law enforcement officers." App. 18a. Thus, the Eighth Circuit's opinion is in full harmony with *Thompson*.

Forrester's final attempt to show a conflict among the lower courts is a citation to a single, unappealed 1996 district court opinion, a passing reference to the cases cited "therein,"

and no discussion whatsoever. It is true that the district court in *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) concluded that certain provisions of New York's child protection procedures created property interests in the children seeking protection, and that *Marisol* is in conflict with the Eighth Circuit's decision before this Court. However, *Marisol* is also in conflict with *Thompson*. *Marisol* quite literally declared that mandatory language, alone, appearing in the child protection statutes at issue created property interests in spite of the fact that specific outcomes are not required. ("That Title 6 requires ... appropriate measures rather than specific steps ... does not alter the mandatory nature of the scheme.") *Marisol*, 929 F.Supp. at 680). This is plainly in conflict with *Thompson*.

The cases cited in *Marisol* do not demonstrate a conflict either. In two of these, the courts of appeal have found protectible interests in procedures relating to child protection–but in cases involving children who are in the custody of the state and placed in state-licensed foster care homes. For example, the Sixth Circuit found that such children have a substantive due process right to be free from the infliction of unnecessary harm, but also that the state statutes that govern the protection of children in state custody and in state institutions specifically created entitlements protected under the U.S. Constitution. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476-77 (6th Cir. 1990). In contrast, the Bass children were not in state custody, and in fact were living with their mother. Likewise, *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 798-800 (11th Cir. 1987), also cited in *Marisol*, concerned only children in the custody of the state.

The remaining appeals court cases cited in *Marisol* found no protectible interests in child protection procedures:

In *Tony L. ex rel. Simpson v. Childers*, 71 F.3d 1182 (6th Cir. 1995), the children were in the custody of their mother, and in the applicable state statutes, no particular substantive outcome was mandated. "The requirement that an investigation be initiated only gives plaintiffs an expectation of receiving a

certain process." *Id.* at 1186.

Children in the custody of their mother brought suit against the state for failing to investigate allegations of abuse in *Doe ex rel. Nelson v. Milwaukee County*, 903 F.2d 499, 502-05 (7th Cir. 1990). The court held that the Wisconsin child abuse reporting statute does not vest plaintiffs with constitutionally-protected property interest. Citing *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989), the court said that "It is by now well-established that in order to demonstrate a property interest worthy of protection under the fourteenth amendment's due process clause, a party may not simply rely upon the procedural guarantees of state law or local ordinance.");

Forrester fails to show any conflict among the circuit courts of appeal or that this Court's decision in *Thompson* is somehow inadequate.

III. Review is not warranted on the issue of appropriate consideration of causation on a qualified immunity appeal because the Eighth Circuit did not rule on the issue of causation.

The Eighth Circuit rejected Forrester's substantive due process claim that Johnson and Rosa somehow increased the danger to Larry and Gary in the manner in which the investigation of abuse was conducted. In rejecting this claim, the Eighth Circuit found that neither Johnson nor Rosa committed any acts of endangerment. Pet. App. 21a. Accordingly, with the children in the custody of their mother, and neither Johnson nor Rosa taking action to change the circumstances of the children, the Eighth Circuit ruled that Forrester's claim was barred by this Court's decision in *DeShaney* (Pet. App. 20a), and the Eighth Circuit cases of *S.S.*, *Ferguson*, and *Burton*. Forrester argues that in arriving at this conclusion, the Eighth Circuit made a ruling on causation, one that would go to the merits of the action and therefore be inappropriate in a qualified immunity analysis. But the Eighth Circuit made no ruling on the merits of the case.

It is true that the Eighth Circuit stated that the record did not substantiate the requisite causal connection (App. 21a), but nowhere did the court make any ruling based on that conclusion. The court's conclusion was that there were no acts of endangerment to consider. App. 21a. The children were in the custody of their mother when the state assessed the family, and the children remained in the custody of their mother when the state left. Having already found that the children had no right to be rescued by the state, and that there was no protectible interest in having certain investigatory procedures followed by Johnson or Rosa, the Eighth Circuit merely recognized that the circumstances of the children had not changed. "The filing of the Bass family assessment report and other acts by Johnson and Rosa were not affirmative acts of endangerment, which 'created greater risks [to the children].'" Pet. App. 21a (citing

S.S. v. McMullen, 225 F.3d 960, 963 (8th Cir. 2000). App. 21a.

Forrester argues that the Eighth Circuit's opinion conflicts with this Court's ruling in *Johnson v. Jones*, 515 U.S. 304 (1995). In *Johnson*, the qualified immunity issue centered on a question of the sufficiency of the pretrial record. This Court held that a defendant asserting qualified immunity may not appeal its denial if the order appealed from determines whether there is a genuine issue of fact for trial. *Id.* at 319-320. Here, the Eighth Circuit did not overrule a trial court determination that certain acts of endangerment could have caused damage to the Bass children, leaving the resolution of that issue for a jury. The Eighth Circuit merely observed that there were no acts of endangerment by the state at all. There was no ruling on causation or any other aspect of the merits. Thus, the decision of the Eighth Circuit in no way conflicts with prior decisions of this Court.

IV. Resolution of the issues in this case involve the application of long-standing and well-established law and was correctly ruled by the Eighth Circuit. This case does not present new or novel issues of law.

At least since this Court's decision in *Deshaney* in 1989, the state has no duty to rescue its citizens from violence committed by prior actors. *DeShaney*, 489 U.S. at 197. It does not matter that the state somehow becomes aware of risks to particular individuals. If the state did not create those risks, or hold a person in custody where such risks arose, the state does not have a duty to protect a person from those risks. *Id.*, at 197-201. Forrester points to no change in the law, nor does Forrester argue a need to change such laws. Because Johnson and Rosa merely investigated a report of abuse and neglect with respect to children not in state custody, they had no duty to intervene and the Eighth Circuit dismissed this claim on that basis. The children were in the same circumstances and subject to the same risks after state involvement as before state involvement.

Forrester further argues that Johnson and Rosa somehow cut off private avenues of rescue by filing a report indicating that Gary and Larry were safe when in fact they were not. Forrester cites *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), for the proposition that a citizen who is in peril has a Fourteenth Amendment right not to have private avenues of help cut off by a state actor. Petition 13. *Ross* involved a deputy sheriff who actively refused to permit private citizens to help a drowning victim. But Forrester points to no private sources of help, nor to any action by Johnson or Rosa that would have or could have cut off any such assistance. At most, Forrester offers the circular argument that Johnson and Rosa decided that the Bass children did not need further intervention, and thereby prevented themselves from acting further – or, at least, prevented the state social service agency for which the

worked from taking further action. Forrester's argument begs the question.

The legal issues decided by the Eighth Circuit were based on long-established law and are in harmony with other circuit courts of appeal as well as this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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